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Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 284

DANIEL A. BENSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner Daniel A. Benson prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above case on May 25, 1966. (R. 1060.)

Citation to Opinion Below.

The opinion of the Court of Appeals (R. 1051) is not yet reported. It is printed as Appendix A below, p. 22.

Jurisdiction.

The judgment of the Court of Appeals was entered on May 25, 1966. (Appendix C, p. 33, *infra.*) The jurisdiction

of this Court is invoked under 28 U.S.C. § 1254(1) The filing of the petition is governed by Rule 22 (2) of the Rules of this Court.

Questions Presented.

1. Assuming in a criminal case that there is evidence to warrant finding a bilateral and conspiratorial relationship between each one of three individual defendants and an aider and abettor (a so-called "wheel" conspiracy), whether incriminating evidence of the acts and statements of one of the individual defendants (a "spoke") is admissible against another individual defendant, where there is no evidence that the latter had any knowledge of an improper relationship of the aider and abettor (the "hub") with any other person or persons.

2. Whether moneys, assumed here to have been improperly received as a kickback by a railroad official from a purchaser of equipment of the railroad, are assets of the railroad within 18 U.S.C. § 660 (forbidding misapplication or conversion of assets of common carriers), where it does not appear that the official acted as an agent of the railroad in receiving said moneys.

3. Whether a single count of an indictment under 18 U.S.C. § 660, sufficiently specifies an offense against the United States which charges that officials of a railroad did, by arranging and permitting a transaction in which ten cars of the railroad were sold to another party for $250,000, wilfully misapply and permit to be misapplied railroad assets; and did wilfully convert moneys and assets of the railroad, to wit, $71,500, where other portions of the count, though containing details of the charge, do not make it clear whether the assets involved are the cars or the $71,500.

Statute Involved.

The statute (18 U.S.C. § 660) is set forth in Appendix B (p. 32, *infra*).

Statement of the Case.

Petitioner was indicted on August 13, 1963 (R. 1) along with Patrick B. McGinnis, George F. Glacy, the Boston & Maine Railroad ("B & M"), International Railway Equipment Corporation ("International"), and Henry Mersey. The indictment was in two counts, Count One being under section 10 of the Clayton Act (15 U.S.C. § 20), and Count Two under 18 U.S.C. § 660. The District Court had jurisdiction under 18 U.S.C. § 3231. Count One was before this Court in *United States* v. *Boston & Maine Railroad*, 380 U.S. 157, but, after the case was returned to the District Court and had gone to trial on both counts, the Court, on the motion of the Government, dismissed the first count. (R. 10 and 109.) The dismissal of Count One resulted in B & M being dropped from the case.

Count Two (R. 17-21) charged that McGinnis, Glacy and petitioner, officers of the Boston & Maine Railroad, by arranging a transaction in which ten B & M stainless steel cars were sold to International for $250,000, wilfully misapplied and wilfully permitted to be misapplied moneys, property and assets of B & M and wilfully converted to their own use moneys of B & M to wit: $71,500. (R. 18-19.) Count Two further alleged that this was accomplished by arranging to sell the ten cars to International for $250,000; that on the day after title passed to International that corporation resold the coaches to another railroad for $425,000; that $71,500, almost all of which came out of the proceeds of this resale, was paid over on various dates in various amounts to McGinnis, Glacy and petitioner. (R.

19-20.) And, finally, it was charged that the officer defendants withheld these moneys from B & M. International and Mersey were charged with aiding and abetting McGinnis, Glacy, and petitioner. (R. 20.)

Petitioner filed a motion for particulars and a motion to dismiss the indictment on the grounds of indefiniteness and failure to state an offense. (R. 26-29.) These motions were denied so far as is now material. (R. 38-39.)

The evidence introduced before the jury warranted it in finding the following facts, stated in the light most favorable to the Government. Important evidence at the trial was conflicting, but the conflicts are of necessity here resolved to the advantage of the Government.

In 1958 McGinnis was president of the Boston and Maine Railroad (R. 370); petitioner was vice-president in charge of operations (R. 555); and Glacy was vice-president of finance and accounting (R. 425). Petitioner's duties were to supervise and direct all train operations and maintenance of equipment. (R. 555.)*

Mersey was the sole owner of International (Ex. 36, R. 787; R. 343), which occupied offices at 150 Causeway Street, a building which housed the main office of B & M. (R. 164.)

In 1947 B & M had purchased twelve stainless-steel cars which were designed to operate as a deluxe train. These included two dining cars, two baggage and passenger combination cars and eight passenger coaches. (R. 426.) In 1957 B & M, having decided to discontinue dining service, sold the dining cars for $52,500 each to an equipment dealer, Waldo E. Bugbee, of San Antonio, Texas, who (along with railroads and others) had received a usual type of circular advertising the diners. (Ex. 60, R. 807;

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*The opinion of the Court of Appeals incorrectly assumes that petitioner's "duties related to the sale and purchase of equipment." There is no support in the record for such a statement. (See p. 28, *infra*.)

R. 177-179.) B & M was then represented by one Bolton, its director of purchases and stores.

On April 30, 1958, Bugbee called at the B & M offices and asked Bolton about an option on the remaining ten stainless-steel cars. (R. 94; Ex. 82, R. 831, fixing date.) Bolton said he could not do anything about it and introduced Bugbee to Glacy, Bolton's superior. (R. 95.) Bugbee asked Glacy for an option to purchase the cars at $50,000 apiece, but Glacy refused. (R. 187-188.) Bugbee then returned to Texas. (R. 188.)

On the same day, April 30, petitioner went by plane with Mersey (R. 616, 623) to Bangor, which was the headquarters of the Bangor & Aroostook Railway, where they looked at equipment. Both fares were paid for by B & M. (R. 601.)

On the day before, April 29, petitioner had issued a letter to Glacy listing surplus passenger equipment but not including the ten stainless-steel cars. Petitioner's file copy (Ex. 21, R. 773) of this letter was later found in the possession of International and, in Mersey's handwriting, bore the words "Add 10 stainless steel coaches not on list, request photos and prints." (R. 58.) A notation on a memorandum attached to another copy of this letter indicated that prints of the ten cars were sent to Mersey from petitioner's department on May 1. (Ex. 70, R. 817.)

In the meantime, Bugbee spent two or three days in Dallas and returned to San Antonio late on Friday, May 9. On returning to his office on the 10th he was told that somebody in Boston had been endeavoring to reach him on the telephone. (R. 190.) That Saturday night, May 10, Mersey telephoned Bugbee, introduced himself and indicated that the ten B & M cars were available, and that Bugbee could get them through him. On May 14 Mersey telephoned Bugbee again. In this conversation Mersey said that he controlled the cars, that a deal was pending, and

that the price would average out at about $50,000 per car. (Ex. 81, R. 819.)

Early in June Glacy told Bolton that a decision had been made to sell the stainless-steel coaches and that they were to be sold to Mersey. Bolton asked him why. Glacy told him that "Mr. McGinnis wanted to handle it in that manner." (R. 99.) When Bolton raised the question "as to how about Bugbee because he was interested in the passenger coaches," Glacy told Bolton that he was to do nothing regarding attempting to sell the cars. (R. 101.)

Mersey telephoned Bugbee on June 25 and reported that McGinnis had complained to him (Mersey) that Wabash, Bugbee's intended customer, who had in 1957 bought the diners, had tried to deal directly with McGinnis. (Ex. 80, R. 825.) Mersey told Bugbee he had the situation in hand and had so informed McGinnis. Bugbee said he could not get Wabash to increase its price beyond $50,000 per car, although Mersey said that it would inhibit his style because of some "commitments" he had. (*Ibid.*)

On June 26, 1958, the day following this telephone conversation, Glacy wrote a memorandum to petitioner, asking whether the ten cars could be retired and, if so, what should be the asking price. Glacy stated that Bangor & Aroostook had offered their similar steel cars in the low $20,000's and that the Seaboard Airline, after looking at the B & M cars, had recently purchased elsewhere. (Ex. 41, R. 799; Ex. V, R. 970.)

On June 30 petitioner wrote a memorandum to Glacy referring to the latter's letter of June 26 "re our 10 stainless steel passenger cars. It is my opinion we can retire these cars for sale and put them on the market for about $30,000 each." (Ex. 40, R. 797.)

On July 17, 1958, in the course of a three-way telephone conversation between Mersey, Bugbee and a Wabash rep-

resentative (Barrett), the price of $425,000, or $42,500 per car, was verbally agreed upon. (R. 195, 264.)

On July 18 Glacy again sent a memorandum to petitioner stating: "I assume that when you evaluated these cars at $30,000 each you had in mind that the Railroad might peddle the cars individually over a period of time. I have at present a firm offer of $250,000 for the ten coaches. The prospective buyer, however, will not take fewer than ten cars but insists on the entire lot for the above-mentioned price. I understand that the New York Central is peddling similar stainless steel coaches and has sold several at prices between $20,000 and $22,000 each." Glacy asked petitioner for his opinion on the acceptance or rejection of this offer of $250,000 for the ten coaches. (Ex. 39, R. 797.) Petitioner on July 21 sent Glacy a letter, prepared by one of petitioner's subordinates (see Ex. W, R. 671), in which he agreed "that if we can dispose of the eight stainless steel coaches and the two stainless steel combines as a package, we could afford to let them go at $25,000 each. Eliminating an entire series of cars such as these will enable us to cut out all the maintenance work on such items as are peculiar to these cars, and eliminate the protective material we are now carrying in stock for this purpose." (Ex. 38, R. 796.)

Following receipt of this letter Glacy prepared a memorandum to serve as a basis for an item on the agenda at the forthcoming directors' meeting. This memorandum, after outlining the acquisition and use by B & M of the ten cars, stated: "In view of the fact that the market is swamped with secondhand passenger equipment for sale, as is evidenced by our recent experience with Seaboard Airline who were practically ready to buy these coaches from us and then ended up by purchasing similar equipment at a price of $20,000-$22,000 from the New York Central, Mr. Benson and I recommend that we accept the offer

of $250,000 for these ten passenger units." (Ex. 42, R. 801.)

The statements in the last paragraph were erroneous. While it is true that Seaboard Airline had examined these coaches, they were never "practically ready to buy" them. The "similar equipment" which they purchased was not from the New York Central at a price of $20,000-$22,000, but from Chesapeake & Ohio for $84,000 apiece. (R. 280, 281, 287.)*

The meeting was held on July 23, and the matter was favorably and unanimously voted. (Ex. 88, R. 864.) Petitioner was not then a member of the B & M board of directors.

After some correspondence between Mersey and Bugbee (Ex. 79, R. 822, and Ex. 29, R. 781), on August 1 Wabash's subsidiary, New Jersey, Indiana & Illinois Railroad Company ("N J I & I"), addressed to International c/o Bugbee at San Antonio, a letter containing a formal order to cover the ten cars at $42,500 each, or a total of $425,000. (Ex. 33, R. 784.)

Glacy executed a bill of sale conveying the cars from B & M to International on August 14 for a total consideration of $250,000. (Ex. 24, R. 777.) By a bill of sale executed and attested August 15, 1958, International conveyed the cars to N J I & I. (Exs. 83, 84, R. 833, 834.)

The usual practice of B & M in connection with the sale of land or equipment is to require certified checks from the purchaser upon delivery of the instruments transferring title (R. 303). In this case, however, the check for $250,000

*The documentary evidence indicates that the part of the agenda for the directors' meeting relating to the sale of the cars was prepared on the same day as the Glacy memorandum. A copy of it was made part of the agenda, the only alteration being that, instead of "Mr. Benson and I recommend" (in the next to the last line), the agenda memorandum read: "management recommends." (Ex. 89.)

drawn by International, signed by Mersey, was postdated August 22, 1958 (Ex. 22, R. 774), and the check was turned over to Glacy. (Ex. 90, R. 865.) It was deposited to the Boston and Maine account and cleared on August 25. (Ex. 22, R. 774.)

In the meantime the check of N J I & I payable to International for $425,000, dated August 18, 1958, was received and deposited by International in its account in the Boston bank on August 20, 1958. (Ex. 85, R. 835.)

Up to the time of the deposit of this check International did not have and never had had in its account sufficient funds to pay for the cars. (R. 338.)

International made payments aggregating $71,500 to McGinnis, Glacy and petitioners as follows (see Exs. 1A-3C, R. 761-768):

McGinnis	October 10, 1958 (2 checks)	$20,000
"	December 3, 1958	15,000
Glacy	August 22, 1958	12,500
"	August 29, 1958	12,500*
Petitioner	August 13, 1958	5,000
	October 9, 1958	1,500
	December 16, 1958	5,000

Petitioner's testimony as to the basis of the payment of $11,500 by International to him was that he had worked for Mersey as a consultant in 1957 (R. 569-571); that he was later asked by Mersey to act as a consultant in a study of certain B & M branch lines or short lines, acquisition of which Mersey was considering (R. 571-572, 578); and that he prepared reports in 1958 on the short lines, acting

*Glacy's two checks bore consecutive numbers and appear to have been drawn the same day. (Ex. 34, Sheet #CD15, showing checks drawn for August, 1958.)

as a consultant at $250 per day and using information of B & M which he said was not confidential and would have been supplied free to any prospective purchaser. (R. 573-575.) Cross-examination by Government counsel brought out that petitioner's consulting work involved him, or soon would have involved him, in a conflict of loyalty between B & M and International. (R. 611-614.)

During the presentation of the Government's case, various acts and statements of McGinnis and Glacy were introduced in evidence against McGinnis and Glacy as defendants respectively, but not against petitioner. The trial judge informed the jury that such evidence as a check might be offered only against one defendant, but that "it may later on be tied up in some way that the Government can offer it as against one or more defendants." (R. 50-51.) Such evidence not introduced against petitioner included the payments to Glacy (R. 53), the payments to McGinnis (R. 54), the postdated $250,000 check of International to B & M of August 22, 1958 (R. 59), International's bank statements for February through August of 1958 (R. 75), the shipping instructions from International showing the destination of the cars as the Wabash (R. 104-105), the statement by Glacy to Bolton regarding McGinnis's wishes as to the handling of the cars by Mersey (R. 111-112), International's bank statements from September through December of 1958 (R. 173), the conversation between Bugbee and Glacy at the B & M offices on April 30, 1958, when Glacy refused to give Bugbee an option on the ten cars (R. 185-188), and McGinnis's question of Mersey (as reported in the Bugbee-Mersey telephone talk of June 25, 1958) as to whether Mersey had the situation in hand (R. 201, 250, 253).

Near the close of the Government's case, however, the Government moved that all evidence which had been received against any defendant be received against all de-

fendants on the ground that there had been ample showing of a common plan. (R. 349.) The Court allowed the motion over objections of the defendants and instructed the jury then and again in the charge to the jury that the acts or statements of one defendant could properly be used as against all the defendants. (R. 359, 685-686.)

Petitioner's motions to acquit at the conclusion of the Government's case (R. 715) and at the close of all the evidence (R. 729) were both denied. (R. 11-12.) Following the jury's verdict of guilty, the trial Court entered judgment against petitioner and sentenced him to imprisonment for eighteen months and a fine of $5,000. (R. 749.)

Reasons for Granting the Writ.

I. Admission of Evidence of Supposed Conspirators.

There was no direct proof of any improper agreement or common plan between petitioner on the one hand and McGinnis and Glacy on the other. The question is whether, assuming that there was evidence warranting the trial judge in inferring that the jury could find that petitioner conspired with Mersey, the acts and statements of McGinnis and Glacy were admissible to prove petitioner's guilt when the only evidence of a common plan was the interlocking of events in the manner set forth rather than knowledge of the petitioner.

The present state of the federal law has been well summarized in Note, "Federal Treatment of Multiple Conspiracies," 57 Col. L. Rev. 387, 388-389: "Although the hub may view his dealings with each spoke as part of a single large enterprise, the spoke is ordinarily concerned merely with his own transaction and is generally not held to have conspired with other spokes unless it can be inferred that their existence was known to him. When such knowledge is shown, it may be fairly said that the spoke

was aware of, and thus consented to, the over-all plan as envisaged by the hub. To dispense with the requirement of demonstrating knowledge of the existence of other spokes is to refuse to distinguish between the agreement as seen by the hub and that viewed by the spokes. Under this approach, a finding of a single conspiracy is unduly facilitated by holding each spoke to the scope of the broader plan. Although a few cases have manifested such a tendency, their present vigor seems questionable." Note, "Federal Treatment of Multiple Conspiracies," 57 Col. L. Rev. 387, 388-389. See also American Law Institute, Model Penal Code, Tentative Draft No. 10, pp. 120-126.

The opinion of the Court of Appeals (App. A, pp. 30-31, *infra*) dealt with this issue by stating: "Even if there were merit in the defendant officers' contention that there was no direct evidence that any of them conspired with each other, a contention which leaves a number of matters unanswered, there was clear evidence that each conspired with Mersey. It was far too much of a coincidence, when events interlocked in the manner set forth, for the district court not to have been able to find that there was one conspiracy embracing all the defendants, rather than three isolated bilateral agreements."

With respect to petitioner, the Court of Appeals emphasized his apparent acquiescence in Glacy's misstatement of the figure at which Seaboard Airline had purchased supposedly similar cars from New York Central.* It is, how-

*Glacy's own office file copy of his memorandum to petitioner of June 26, 1958 (Ex. 41, R. 799), contained a notation in Glacy's writing that "NYC sold for between 20,000 and 22,000 each." Glacy's memorandum to petitioner of July 18, 1958, stated: "I understand that the New York Central is peddling similar stainless steel coaches and has sold several at prices between $20,000 and $22,000 each." (Ex. 39, R. 797.) Glacy's July 22, 1958, memorandum for use in preparing an agenda for the directors' meeting contained the misstatement as set forth above at page 7.

ever, piling inference upon inference to conclude from that kind of evidence that petitioner knew Glacy was supposedly doing something wrong, let alone that McGinnis was enriching himself at the expense of B & M.

Petitioner's functions were to supervise and direct train operations and maintenance of equipment. He had charge of the handling of station agencies and personnel. He made recommendations regarding capital improvements. (R. 555-556.) His background and experience lay in his various railroad jobs: cleaner and repairer of locomotives, then yard clerk, then promoted to yard brakeman, then yard conductor, passenger trainman, passenger baggage master, passenger ticket collector, conductor, yard master, then train master, terminal superintendent, assistant general superintendent, then assistant to the president making studies of operations and maintenance. (R. 554.)

There is no basis in this for the inference of a general conspiracy. Petitioner's failure to contradict Glacy does not lead to the conclusion that petitioner knew Glacy was acting illegally rather than that it was due to inadvertence, ignorance or carelessness.

The result in this case is foreshadowed in an opinion of Judge Learned Hand written nearly thirty years ago: "At times it seemed to be supposed that, once some kind of criminal concert is established, all parties are liable for everything anyone of the original participants does, and even for what those do who join later. Nothing could be more untrue. Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it; if later comers change that, he is not liable for the change; his liability is limited to the common purposes while he remains in it. The confusion is perhaps due to the fact that everything done by the conspirators—including the declarations of later entrants—is competent evidence against all, so far as it may fairly be thought to

be in execution of the concert to which the accused is privy, though that doctrine too is often abused." *United States* v. *Peoni*, 100 F. 2d 401, 403 (2d Cir.).

Petitioner believes that the decisions of this Court, although distinguishable factually, reflect an approach which does not permit the result reached by the Courts below. Evidence that an individual accused knows or has reason to know that he and a person with whom he deals are acting illegally does not without more warrant an inference that others dealing with that person are also advancing an illegal end. In *United States* v. *Falcone*, 311 U.S. 205, it was held that respondents' knowledge that materials supplied by them would be used in making illegal liquor fell short of showing respondents' participation in a conspiracy or that they knew of it. In *Kotteakos* v. *United States*, 328 U.S. 750, 755, when the Government characterized the transaction there involved as having a pattern "of separate spokes meeting in a common center," this Court added that the pattern was "without the rim of the wheel to enclose the spokes." It was there held erroneous to charge the jury that there was a single conspiracy. And in *Blumenthal* v. *United States*, 332 U.S. 539, where the Court ruled that the evidence warranted a finding of a single conspiracy at prices over OPA levels among the two operators of Francisco Company and the three salesmen who sold whiskey for Francisco, the opinion based the ruling as to the salesmen on the following observation: "True, each salesman aided in selling only his part. But he knew the lot to be sold was larger and thus that he was aiding in a larger plan."

The present case is not the *Blumenthal* situation, where the salesmen were participants in a common plan "joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their

common single goal." 332 U.S. at 558. The facts in the Government's case do not meet the standard set forth in that opinion, because there was no showing that petitioner knew that Mersey or International had conspired with any other person or persons or that there was any "larger plan," however indefinite its scope. Compare American Law Institute, Model Penal Code, § 5.03(2), requiring such a showing of knowledge in order to widen the area of a conspiratorial relationship. There was no proof or basis for inferring that petitioner had any idea that any other B & M officials had received or were receiving payments from Mersey or International, whether or not derived from the proceeds.

Settlement of the question here presented is in the public interest because of the fact that conspiracy cases are an important part of federal criminal litigation. The present case presents a distinct issue in applying the assumptions of *Blumenthal* v. *United States* which is appropriate for decision in this Court. The inquiry called for by the American Law Institute's test, of which *Blumenthal* is said to be illustrative (Tentative Draft No. 10, *supra,* p. 12, at 124), "will often be more detailed and sometimes will be more complicated than that called for under looser, current doctrine. We submit that any greater difficulty involved is justified by the need for effective means of limiting a conspirator's criminal liability and preventing the other abuses possible under looser approaches toward the scope of a conspiracy. Further, we submit that the focus upon each individual's culpability with regard to each criminal objective should be more helpful to juries than the broad formulations with which they are often charged today; and that it accords more closely with traditional standards for testing criminal liability." (*Ibid.,* 126.)

II. The Status of Kickbacks.

An important question of federal law which has not been, but ought to be, settled by this Court is whether or not a misapplication or conversion of an employer's funds or assets under a federal statute (see the banking statute, 18 U.S.C. § 656, as well as the carrier statute in § 660) arises out of the improper receipt of money from another party by a corporate officer in connection with a corporate transaction.

So far as petitioner is aware, there is no prior decision going so far as to hold that such a receipt of money constitutes criminal misapplication, embezzlement or conversion of assets of the employer. The decision of the Court of Appeals is at odds with the reasoning of the decisions of the Eighth Circuit in *Berra* v. *United States,* 221 F. 2d 590, 593-594, and the Second Circuit in *United States* v. *Bruswitz,* 219 F. 2d 59, 61-62. Those cases ruled that receipts of kickbacks were not embezzlements, and hence not free of income taxation under the doctrine of *Commissioner* v. *Wilcox,* 327 U.S. 404.

And yet the District Court permitted the jury to convict on the basis of petitioner's having received $11,500 of B & M's money.* The Court of Appeals, in affirming the conviction of petitioner, stated: "The defendant officers committed one underlying offense, violative of the statute, whether their action is sought to be broken down as depriving the railroad of the cars for less than they were worth, to their individual advantage, or as pocketing proceeds which, in law, belonged to the railroad." (P. 25,

E.g., "The only statute before us is the one here, and we are concerned with the one point, I think, did these defendants receive part of the consideration that Mersey received for the sale of the ten cars, by diverting some of it into their own pockets?" (R. 684.)

infra.) This is in the light of the following specific instruction of the District Court: "Then they [the defendants] say on all the evidence the moneys paid by New Jersey, Indiana & Illinois Railroad Company to International Railway Equipment Corporation for the purchase of the cars became the moneys of International Railway Equipment Corporation. And I charge you that that is the law." (R. 700.)

Decisions under the banking statute (U.S. Rev. Sts., Title LXII, c. 3, § 5209, now 18 U.S.C. § 656), from which 18 U.S.C. § 660, was derived, have assumed and held that a conversion of the bank's assets can only be found with respect to assets in which the bank had some proprietary interest. *Hudson* v. *United States,* 55 F. 2d 591, 594 (8th Cir.). *Golden* v. *United States,* 318 F. 2d 357, 361 (1st Cir.). *Groves* v. *United States,* 343 F. 2d 850, 851 (8th Cir.). See also *Heath* v. *United States,* 209 F. 2d 318 (9th Cir.), under the similarly worded 18 U.S.C. § 641. The present decision is irreconcilable with those cases.

Further, only this Court, by granting certiorari, is in a position to resolve the confusion that would result if the present decision under a general misapplication statute is left undisturbed. There are already statutes in the field of transportation dealing with commercial bribes and kickbacks. 49 U.S.C. § 1 (17) (b), prohibits the giving and receiving of bribes to influence railroad employees in regard to traffic decisions. By 49 U.S.C. § 20a (12), it is made unlawful for railroad officers to receive money or value in connection with transactions in securities. See generally Note, "Control of Nongovernmental Corruption by Criminal Legislation," 108 U. of Pa. L. Rev. 848; and Annotation, "Validity and Construction of Statutes Punishing Commercial Bribery," 1 A.L.R. 3d 1350.

III. The Sufficiency of the Indictment.

The Court of Appeals, by upholding the indictment, avoided mentioning *Russell* v. *United States*, 369 U.S. 749, possibly accepting an argument of the Government that the *Russell* case applied only in the field of Congressional investigations. Petitioner believes that the decision on the sufficiency of the indictment is in conflict with the opinion in *Russell*, and that the writ should be granted for that reason.

The uncertainty in the indictment is that it presents two inconsistent charges.

The key paragraph 11 (R. 18-19) charges misapplication of the cars and then charges conversion of $71,500, the amount received by the officer defendants. The two charges cannot stand consistently together in the same count, and the result is that paragraph 11 presents petitioner with a dilemma. He cannot know, and does not now know, whether he is convicted of converting the cars or the money.

The Government's theory of the case was that the defendant officers had, by receiving the money from International, converted B & M property. We have set forth in a footnote part of the opening of the Government as illustrative of this theory, which the Government has retained through the proceeding.*

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*"Another statute also mentioned in count two of the indictment, Section 2 of Title 18 of the United States Code, provides that anyone who aids or abets in the commission of an offense against the United States, such as a violation of Section 660, is equally responsible and equally guilty, along with the railroad officer or director who committed the violation of Section 660.

"So in count two Patrick B. McGinnis, George A. Glacy and Daniel A. Benson are named as the defendants who violated Section 660, while International Railway Equipment Corporation and Henry Mersey are also named as defendants but are charged with

The Court of Appeals, however, and possibly the District Court also, gave the indictment a different reading:

> "The offense charged was the improper sale at a known inadequate price, to a fraudulent middleman, with defendants' intended acquisition and retention of the proceeds, all part of the one grand design. . . . The defendant officers committed one underlying offense, violative of the statute, whether their action is sought to be broken down as depriving the railroad of the cars for less than they were worth, to their individual advantage, or as pocketing proceeds which, in law, belonged to the railroad." (Pp. 24-25, *infra*.)

While the concept of misapplication is not restricted to technical embezzlement, the consequence of that is not to relax the requirements of the Fifth Amendment with regard to specification of the offense. This Court, after saying that the concept of misapplication has no settled technical meaning, indeed has gone on to hold that for precisely that reason the words "wilfully misapplies" must be "supplemented by further averments, showing how the misapplication was made, and that it was an un-

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having aided and abetted the railroad or the defendants in their violation of Section 660.

"The violation of Section 660 which is charged against the defendants McGinnis, Glacy and Benson in count two, arises from the fact that by arranging and carrying out the sale of these ten stainless steel coaches to International Railway Equipment Corporation [9] for $250,000, they willfully misapplied and willfully permitted to be misapplied, and willfully and knowingly converted to their own use, the $71,500 which International Railway Equipment Corporation paid to them out of the $425,000 which it got by reselling the cars to the Wabash Railroad, $71,500 which rightfully and legally belonged to the Boston & Maine Railroad, in whose property they were dealing." (R. 43.)

lawful one." *Batchelor* v. *United States,* 156 U.S. 426, 429, and cases there cited.

The present indictment is defective, not on the ground that it fails to give details, but because it fails to charge the offense. There is an obvious distinction between a defendant's "constitutional right to know what *offense* is charged" and "his need to know the *evidentiary details* establishing the facts of such offense." *Van Liew* v. *United States,* 321 F. 2d 664, 670 (5th Cir.).

Russell v. *United States,* 369 U.S. 749, condemns every indictment which leaves "the prosecution free to roam at large—to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal." 369 U.S. at 768.

The factors pointed out in *Russell* exist in this case. The indictment here left a major issue undefined. It plainly enables the conviction "to rest on one point and the affirmance of the conviction to rest on another." 369 U.S. at 766. On the present record, petitioner believes that that in fact is what has happened.

The spirit of the decision of the Court below is at odds with two decisions in the Seventh Circuit applying the *Russell* case. *Lauer* v. *United States,* 320 F. 2d 187 (7th Cir.) (holding that under *Russell* an indictment had to identify the person to whom narcotics were alleged to have been illegally sold). *Beitel* v. *United States,* 306 F. 2d 665 (7th Cir.) (holding that an indictment of a bankrupt for having concealed assets of a specified value had to identify the assets). The First Circuit has already rejected *Lauer* v. *United States* in *Sanchez* v. *United States,* 341 F. 2d 379, 380 (1st Cir.); cert. den. 381 U.S. 940, 945.

There is, moreover, confusion as to whether *Russell* has any application outside the field of Congressional investigations. The Government has argued that it has not, and for this view there is no explicit support in the cases. How-

ever, a limitation on *Russell* has been advanced in Cipes, Moore's Federal Practice—Rules of Criminal Procedure, par. 7.04 ("But the facts in *Russell* were unique and its scope will undoubtedly be confined"); in a case note on the *Russell* decision in 41 Tex. L. Rev. 590, 594 ("The dissenting opinions in the *Russell* case express the fear that this holding will lead to a requirement of detailed indictments in all criminal cases contrary to Rule 7(c) of the Federal Rules of Criminal Procedure. The present case can be distinguished in that the statutory basis of this indictment involves a first amendment problem not found in other criminal statutes"); and in Note, "The Supreme Court, 1961 Term," 76 Harv. L. Rev. 54, 103. Petitioner accordingly submits that the applicability of *Russell* in cases outside the First Amendment area, although expressly affirmed by the Fifth and Seventh Circuits, is a further important question of federal law which has not been, but should be, settled by this Court.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CLAUDE B. CROSS,

JOHN M. REED,

Counsel for Petitioner.

[Appendix follows.]

Appendix A.

United States Court of Appeals
For the First Circuit

No. 6652.

GEORGE F. GLACY,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE;

No. 6653.

DANIEL A. BENSON,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE;

No. 6662.

HENRY MERSEY ET AL.,
DEFENDANTS, APPELLANTS,
v.
UNITED STATES OF AMERICA,
APPELLEE;

No. 6666.

PATRICK B. MCGINNIS,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Edward O. Proctor for George F. Glacy, appellant.

Claude B. Cross, with whom *John M. Reed* and *Withington, Cross, Park & McCann* were on brief, for Daniel A. Benson, appellant.

Edward F. Myers, with whom *Cornelius J. Sullivan* and *Holtz, Sullivan & Zonderman* were on brief, for eHnry Mersey et al., appellants.

William T. Griffin, with whom *Lawrence R. Cohen* and *Newton H. Levee* were on brief, for Patrick B. McGinnis, appellant.

John F. Dougherty, Attorney, Department of Justice, with whom *Donald F. Turner*, Assistant Attorney General, *W. Arthur Garrity, Jr.*, United States Attorney, and *Howard E. Shapiro* and *Richard A. Wegman*, Attorneys, Department of Justice, were on brief, for appellee.

OPINION OF THE COURT.

May 25, 1966.

ALDRICH, *Chief Judge*. The defendants, McGinnis, Glacy, and Benson, president, vice-president in charge of finance and accounting, and vice-president in charge of operations, respectively, of the Boston & Maine Railroad, were convicted of misapplying[1] assets of the railroad. Defendants Mersey and International Railway Equipment Corporation, hereinafter collectively, Mersey,[2] were convicted of aiding and abetting. We will deal with the evidence later at more length. Briefly, the government showed that defendant officers presented to the railroad's board of directors a proposal to sell ten stainless steel passenger cars

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[1] "[E]mbezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property, or assets . . . or willfully or knowingly converts the same to his own use or to the use of another. . . ." 18 U.S.C. §660.

[2] Mersey was the principal officer and representative, as well as sole stockholder of International.

for $250,000, an unreasonably low price, and obtained approval by false statements of what similar cars were selling for; that they caused the cars to be sold for that price to Mersey, the railroad receiving payment only after Mersey had sold to another road which was already committed to buy for $425,000; that Mersey thereafter paid the defendant officers, individually and respectively, $35,000, $25,000 and $11,500, or a total of $71,500, much of which was actual proceeds of the sale.[3] All defendants moved unsuccessfully for a dismissal of Count 2 of the indictment, the one on which they were convicted,[4] and for directed verdicts of acquittal for joint and, in most instances, individual reasons. The appeals raise certain further issues.

A basic matter, which defendants presented in various manners,[5] is a supposed distinction between misapplying the cars and misapplying the proceeds. We are unimpressed, as was the district court, whose analysis of the issue and exposition to the jury was a model of simplicity and clarity.

The offense charged was the improper sale at a known inadequate price,[6] to a fraudulent middleman,[7] with de-

[3] The fact that the proceeds could be specifically traced becomes relevant in a later matter, but does not enter into our decision that the offense was made out.

[4] Count 1, after having gone to the Supreme Court, *United States v. Boston & Maine R.R.*, 1965, 380 U.S. 157, was dismissed during trial.

[5] The defendants' attacks on the indictment, demands for particulars, motions for acquittal and a number of their refused requests for instructions, directly or indirectly raised this issue.

[6] It is this aspect of the case that distinguishes it from the state decisions cited by the defendants. We agree that the agents there entrusted to sell property, whether potatoes, watermelons, bonds, stock, automobiles, or spreaders, could not be convicted of conversion of the proceeds on a charge of converting the property. In

[7] (See opposite page.)

fendants' intended acquisition and retention of the proceeds, all part of the one grand design. The statute is not restricted to technical embezzlement, but embraces the broader concept of misapplication. *Cf. Batchelor* v. *United States,* 1895, 156 U.S. 426; *United States* v. *Mulloney,* D. Mass., 1934, 8 F. Supp. 674, *aff'd,* 79 F.2d 566, *cert. den.* 296 U.S. 658; *Kramer* v. *United States,* 4 Cir., 1951, 190 F.2d 712, 717-18. The defendant officers committed one underlying offense, violative of the statute, whether their action is sought to be broken down as depriving the railroad of the cars for less than they were worth, to their individual advantage, or as pocketing proceeds which, in law, belonged to the railroad.[8]

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those cases the sales were fully authorized. In the case at bar if defendants' only misconduct had been to intercept and pocket proceeds of an honest sale, the present indictment would have been inappropriate. But that is not this case. The defendants were charged with a larger offense. The district court's instruction laid this issue on the line.

> "If what these defendants did was bad judgment in selling the cars at the price for which they sold them, or was stupidity and nothing more, then they are not responsible. They have a wide degree of latitude in the exercise of their judgment. But willfulness means that they intended to do what they did, and did it voluntarily, and with a specific intent, or bad purpose, the bad purpose being to line their own pockets at the expense of the Boston and Maine."

The statement, made in oral argument by one of the defendants, that the "court put to the jury that the only question was whether the defendants converted the money," if the charge is taken as a whole is simply not so.

[7] Mersey, because he took title, objects to being described as a middleman. It is clear on the government's evidence, however, that the cars passed through him as part of the original scheme, in order to siphon off what rightly should have gone to the railroad.

[8] For this latter reason cases such as *Heath* v. *United States,* 9 Cir., 1954, 209 F.2d 318, and *Golden* v. *United States,* 1 Cir., 1963, 318 F.2d 357, are inapposite. In Heath it conclusively appeared that the property had ceased to be government property before it

The indictment fully sets out the statutory offense and the basic facts charged, so that neither the grand jury nor the defendants were misled. Count 2 of the indictment charges one offense, and the evidence abundantly supports it, unless there was some error as to its admission.

The defendants duly objected to the court's instruction to the jury, near the end of the government's case, that it was warranted in considering all the evidence against all the defendants. This raises the question whether sufficient concert among them was independently shown. *Lee Dip* v. *United States*, 9 Cir., 1937, 92 F.2d 802, *cert. den.* 303 U.S. 638; *United States* v. *Olweiss*, 2 Cir., 1943, 138 F.2d 798, *cert. den.* 321 U.S. 744.

Evidence introduced by the government and independently admissible, disclosed the following. In 1957, prior to the sale of the ten passenger cars, the railroad had sold two stainless steel dining cars to Bugbee, a Texas dealer in used railway equipment. Throughout this prior transaction the railroad acted through its employee, Bolton, who was the one regularly in charge of such matters. Bugbee resold the cars to the Wabash Railroad. All of these facts were known to all of the officer defendants. On April 30, 1958[9] Bugbee saw Bolton in Boston and indicated an interest in the passenger cars. Bolton replied that they were in use and not for sale. However, on request, he took Bugbee to Glacy. Bugbee inquired if he could have an option to purchase the cars for $500,000. Glacy refused. On April 29 Glacy had received from Benson, the defendant officer in charge of such matters, a current list of equipment available for sale. These cars were not on it. We

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was converted. In *Golden* the question was whether the property misapplied by the defendant had been delivered to him in his capacity as officer of the bank, or as a fiduciary for another.

[9] Unless otherwise noted, all dates refer to 1958.

now recite, under each defendant's name, evidence admissible at least against the stated defendant.

Mersey

Mersey's files contained a copy of Benson's "for-sale" list, dated, in Mersey's handwriting, April 30. On it was written in Mersey's handwriting, "add ten stainless cars," with a notation that Mersey was requesting prints. On May 10, after calling several times previously, Mersey reached Bugbee on the telephone, introduced himself, said he "owned" the ten cars, and offered to split with Bugbee whatever the latter could realize above $500,000. On June 25 Mersey telephoned Bugbee and reported that McGinnis had complained to Mersey that Wabash had tried to deal directly with McGinnis. Mersey stated that he had the situation in hand, and that he had told McGinnis so. Bugbee reported, in the same conversation, that Wabash would not pay more than $500,000. On July 17 Bugbee informed Mersey that Wabash's top price was $425,000.

The sale was voted on July 23, and consummated August 14. Between August 13 and December 16, Mersey made payments to the defendant officers totalling $71,500.

Glacy

Glacy, in early June, informed Bolton that the sale of the ten cars would not be handled by Bolton, but by Mersey. Bolton objected that it was his job, and raised Bugbee's prior interest. Glacy told Bolton that McGinnis wanted it handled this way. On June 26, the day after Bugbee had told Mersey that Wabash's top price was $500,000, Glacy stated in an office memorandum seeking Benson's pricing of the cars, that similar cars had been bought from the New York Central by Seaboard Airline for $20,000 to $22,000 after it had been "practically ready to buy these

coaches from us." In fact Seaboard had not been practically ready, had bought nothing from New York Central, and had bought cars, the nature of which did not appear, from the C & O for $84,000. On July 18, the day after Bugbee had told Mersey that Wabash's top figure was $425,000, Glacy informed Benson by office memorandum that he had an offer of $250,000, and requested Benson's approval. When the sale was consummated Glacy, upon releasing the cars, accepted a personal check post-dated by eight days. It was customary to require a certified check. The personal check exposed the railroad to serious risk. Mersey was already indebted to the railroad in the amount of $75,000 for a longer time than it was customary to permit, and had a bank balance of only $30,000.

Glacy received and collected payments on two checks, $12,500 each, drawn by Mersey on August 22 and 29.

Benson

Benson took Mersey to Bangor on April 30, the railroad paying the air fare. Since no railroad reason for Mersey's trip has been suggested, this indicates, at the least, some intimacy between Benson and Mersey. Benson's retained office copy of his "for-sale" list had a note attached stating that prints of the ten cars had been given Mersey on May 1. Benson, whose duties related to the sale and purchase of equipment, and who could be expected to be knowledgable, in giving Glacy a price of $30,000 on June 30, accepted Glacy's gross misstatement of the New York Central price. When Glacy, by subsequent memorandum, asked approval of $25,000 a car, Benson replied affirmatively, stating the cars were going to require heavy overhaul, at a cost of $25,000 apiece.

Benson received and collected payment on three checks drawn by Mersey on August 13, October 9, and December 16, for $5,000, $1,500, and $5,000, respectively.

McGinnis

It was McGinnis' custom, as president, to review the agenda for the directors meeting beforehand. The memorandum presented to the July 23 meeting requesting a vote on the sale of the ten cars did not name the buyer. Nor did it name the railroad officials who were endorsing the sale, but merely stated that it was recommended by "management." These lacunae were both contrary to standard practice. The sale was unanimously voted. In January 1962, McGinnis told an ICC investigator that he had been the one to present the sale to the directors. On the stand he denied this. Glacy and Benson were not directors, and if McGinnis had not sponsored the sale it does not appear who did.

McGinnis received and collected payment on three checks drawn by Mersey—two on October 10, each for $10,000, and one on December 3, for $15,000.

Each officer defendant took the stand and admitted, and sought to explain, receipt of the payments charged to him. Benson testified that his payments were for information and advice allegedly given Mersey in connection with other property Mersey had considered buying from the railroad. In making this explanation Benson, at the least, implicated himself as sufficiently intimate with Mersey to sell him information in clear breach of his fiduciary obligations to his employer.

Glacy testified that his two checks represented two years' salary for consulting services rendered to Mersey. The checks, ostensibly a week apart, were actually contiguous in the checkbook. On Glacy's testimony they represented a payment of the first year's salary nearly eight months later, and of the second year's salary four months prior to the end of the year. Furthermore, Glacy had previously received from Mersey appropriate compensation for the

first year's salary, assuming it was earned at all. As against Glacy's testimony, in January 1962 he had told an ICC inspector that he had never received payments of any description from Mersey or his company.

McGinnis testified that his payments from Mersey had been for services in connection with a transaction referred to as the Schiavone loan. The loan never went through. In January 1962 McGinnis told an ICC inspector that he had never received any payments from Mersey or his company, and specifically, that he had not received $35,000, and that although he had worked on the Schiavone loan, it had not materialized and he had received no fee. There were additional inconsistencies of record in McGinnis' courtroom explanations.

Mersey did not take the stand. His company records showed the various payments, but inconsistently with some of the defendant officers' testimony.

In sum, it could properly be found that each of the defendant officers consciously acted to facilitate the improper sale of the cars. Among other things, Glacy grossly misstated the circumstances of supposedly similar cars being bought by the Seaboard Airline; Benson, within whose expertise such matters lay, acquiesced in his statement, and in the price at which the Boston & Maine cars were ultimately sold; and McGinnis presented the matter of the sale to the board of directors in a significantly unorthodox manner. Even if there were merit in the defendant officers' contention that there was no direct evidence that any of them conspired with each other, a contention which leaves a number of matters unanswered, there was clear evidence that each conspired with Mersey. It was far too much of a coincidence, when events interlocked in the manner set forth, for the district court not to have been able to find that there was one conspiracy embracing all the defend-

ants, rather than three isolated bilateral agreements. The court's ruling was amply supported.

Only one further matter merits mention. Some of the testimony damaging to the defendants came from Bugbee, whose accounts of his telephone conversations with Mersey were reinforced by introduction of transcripts of recordings made by Bugbee without the knowledge, and hence consent, of Mersey. Defendants say that the transcripts are rendered inadmissible because their divulgence would violate 47 U.S.C. § 605, the arguably pertinent portion of which reads,

> "[N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communications to any person. . . ."

We agree with the reasoning of the court in *Carnes* v. *United States,* 5 Cir., 1961, 295 F.2d 598, *cert. den.* 369 U.S. 861, holding the transcripts admissible. This result accords not only with the decision of the court in *Rathbun* v. *United States,* 1957, 355 U.S. 107, but, we believe, with the minority opinion as well.

Affirmed.

Appendix B.

The statute involved in the present proceeding is 62 Stat. 730, 18 U.S.C. § 660. The text of the statute is, and at all material times has been, as follows:

> "Whoever, being a president, director, officer, or manager of any firm, association, or corporation engaged in commerce as a common carrier, or whoever, being an employee of such common carrier riding in or upon any railroad car, motortruck, steamboat, vessel, aircraft or other vehicle of such carrier moving in interstate commerce, embezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property, or assets of such firm, association, or corporation arising or accruing from, or used in, such commerce, in whole or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.
>
> "The offense shall be deemed to have been committed not only in the district where the violation first occurred but also in any district in which the defendant may have taken or had possession of such moneys, funds, credits, securities, property or assets.
>
> "A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution hereunder for the same act or acts."

Appendix C.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6653.

DANIEL A. BENSON,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

JUDGMENT

May 25, 1966

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
ROGER A. STINCHFIELD
Clerk.

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Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 285

GEORGE F. GLACY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

EDWARD O. PROCTOR,
225 Franklin Street,
Boston, Massachusetts 02110,
Attorney for Petitioner.

ADDISON C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON.

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Supreme Court of the United States.

OCTOBER TERM, 1965.

No.

GEORGE F. GLACY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner George F. Glacy prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above entitled case on May 25, 1966.

Citation to Opinion Below.

The opinion of the Court of Appeals, printed in Appendix B hereto, *infra,* p. 8, is not yet reported.

Jurisdiction.

The judgment of the Court of Appeals was entered on May 25, 1966 (Appendix C, p. 18, *infra*). The jurisdic-

tion of this Court is invoked under 28 U.S.C. § 1254 (1). The filing of the petition is governed by Rule 22 (2) of the Rules of this Court.

Questions Presented.

1. Where the indictment charges that the three defendant railroad officials did, by arranging a transaction pursuant to which ten of the Boston & Maine Railroad's coaches were sold to International, a fourth defendant, for $250,000, "wilfully misapply, and wilfully permit to be misapplied moneys, funds, credits, securities, property and assets of the said B&M . . . and did wilfully convert to their own use moneys, funds, credits, securities, property and assets of the said B&M, to wit, $71,500; in violation of Section 660, Title 18, U.S. Code," which violation was effectuated by causing the sale of the coaches for an inadequate price to International, which resold them at a profit, out of which International gave the said defendants in varying amounts $71,500; whether the indictment intends to charge misapplication of the coaches as well as conversion of the moneys received from the proceeds of their resale; and whether this sufficiently specifies an offense against the United States.

2. Where railroad officials arrange to sell ten of the railroad's coaches for $250,000 to a third party, which resells them for $425,000, out of which it gives $71,500 in varying amounts to said officials, who take the same for their own use and not as agents of the railroad; whether the receipt thereof can constitute a conversion of the railroad's property; and whether the Court of Appeals erred in holding that these moneys were "proceeds *which, in law, belonged to the railroad*" (Opinion, *infra*, p. 11).

Statute Involved.

The statutory provision involved is 18 U.S.C. § 660, under which the indictment was laid. It is printed in Appendix A, *infra*, p. 7.

Statement.

Count Two of the indictment (R. 17-21)* charges a violation of 18 U.S.C. § 660, and alleges that the defendants McGinnis, Glacy and Benson, officers of the Boston & Maine Railroad, wilfully misapplied and wilfully permitted to be misapplied moneys, property and assets of the Boston & Maine Railroad, and wilfully converted to their own use moneys of said Boston & Maine Railroad, "to wit, $71,500" (R. 18-19). In brief, it charges that this was accomplished by the said three defendants' arranging to sell ten stainless-steel cars belonging to the railroad to the defendant International Railway Equipment Corporation for the sum of $250,000; that on the day after title passed to International that corporation resold the coaches to another railroad for $425,000; that $71,500, almost all of which came out of the proceeds of this resale, was paid over on various dates in various amounts to McGinnis, Glacy and Benson (R. 19-20); and, finally, that these individual defendants withheld the said moneys from the Boston & Maine. The defendants International and its principal officer, Mersey, are charged with aiding and abetting McGinnis, Glacy and Benson in the perpetration of the alleged crime (R. 20).

All of the defendants filed motions to dismiss the indictment as to Count Two. The motions were denied by the trial judge (R. 38-39).

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*The case went to trial on two counts, Count 1, which was before this Court, *United States* v. *Boston & Maine Railroad*, 1965, 380 U.S. 157, was dismissed on motion of the Government in the course of the trial (R. 108, 109).

The case was tried at length before a judge and jury. At the close of the evidence the defendants presented motions for judgments of acquittal (R. 729-744). These were denied (R. 676-677; and see R. 12).

*Briefly, at the trial, the Government showed that defendant officers presented to the railroad's board of directors a proposal to sell ten stainless-steel passenger cars for $250,000, an unreasonably low price, and obtained approval by false statements of what similar cars were selling for; that they caused the cars to be sold for that price to Mersey,† the railroad receiving payment only after Mersey had sold to another road, which was already committed to buy for $425,000; that Mersey thereafter paid the defendant officers, individually and respectively, $35,000, $25,000 and $11,500, or a total of $71,500, much of which was actual proceeds of the sale.

The jury found all the defendants guilty (R. 705).

The cases went to the Court of Appeals on the appeals of all the defendants from the judgments of the District Court entered against them, which sentenced the individual defendants to eighteen months in prison and imposed fines upon them in addition thereto, as well as upon the defendant International (R. 13-14; and see R. 746-752 (judgments) and 753-757 (appeals)). The Court of Appeals affirmed (Appendix B, *infra*, p. 17).

Reasons for Granting the Writ.

1. Insufficiency of the Indictment.

The decision of the court below is in conflict with *Russell* v. *United States*, 369 U.S. 749.

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*We take this brief statement of the Government's evidence from the Court of Appeals opinion, Appendix B, *infra*, at p. 9.

†Actually, Mersey's company, International.

It is uncertain whether the indictment charges both misapplication of the coaches and conversion of the proceeds of their resale. If it does, it presents two inconsistent charges. The defendant has a constitutional right to know what offense he is charged with. *Van Liew* v. *United States,* 321 F. 2d 664 (5th Cir. 1963).

2. Conversion of the Railroad's Property.

The Court of Appeals decision upholds the trial judge's instructions permitting the jury to find that the defendant Boston & Maine officers were guilty of criminal conversion of the railroad's property when they received from International moneys aggregating $71,500 out of the proceeds of International's resale of the cars (Charge, R. 683, 684, 700), at the same time instructing the jury that these moneys which International received from the sale of the cars "became the moneys of International" (R. 700).

The Court of Appeals expressly holds that the proceeds of the resale by International paid over to the defendant officials "in law, belonged to the railroad" (Op. *infra,* p. 11).

Petitioner contends that the language of section 660, a criminal statute to be strictly construed, expressly defines the crime as misapplication or conversion of the carrier's assets, and that a "kick-back" from the purchaser cannot be a conversion of the carrier's assets, because the carrier had no property right therein.

The fiduciary duty of the railroad officials to account did not create in the railroad a property right in the proceeds of the resale.

We believe that this decision conflicts with many other decisions dealing with misapplication or conversion of an employer's property.

While there are no decisions construing this language of 18 U.S.C. § 660 (originally enacted as section 9 of the Clayton Act, October 15, 1914, c. 323, § 9), there are numerous decisions under the banking statute, from which it was derived (U.S. Rev. Stats. Title LXII, c. 3, § 5209), which have uniformly held that a conversion of the bank's assets can only be of assets in which the bank has a property interest. *Golden* v. *United States,* 318 F. 2d 357, 361 (1st Cir. 1963). *Hudson* v. *United States,* 55 F. 2d 591, 594 (8th Cir. 1932). *Kramer* v. *United States,* 190 F. 2d 712, 717 (4th Cir. 1951). *Groves* v. *United States,* 343 F. 2d 850, 851 (8th Cir. 1965). The decisions are to the same effect under 18 U.S.C. § 641, making embezzlement from the United States a crime. *Heath* v. *United States,* 209 F. 2d 318 (9th Cir. 1954). *United States* v. *Johnston,* 268 U.S. 220 (1925).

Conclusion.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD O. PROCTOR,
Counsel for petitioner.

Appendix A.

Title 18, United States Code.

Section 660. Carrier's funds derived from commerce; State prosecutions.

Whoever, being a president, director, officer, or manager of any firm, association, or corporation engaged in commerce as a common carrier, or whoever, being an employee of such common carrier riding in or upon any railroad car, motortruck, steamboat, vessel, aircraft or other vehicle of such carrier moving in interstate commerce, embezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property, or assets of such firm, association, or corporation arising or accruing from, or used in, such commerce, in whole or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred but also in any district in which the defendant may have taken or had possession of such moneys, funds, credits, securities, property or assets.

A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution hereunder for the same act or acts. (June 25, 1948, ch. 645, 62 Stat. 730.)

Appendix B.

United States Court of Appeals
For the First Circuit

No. 6652.

GEORGE F. GLACY,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE;

No. 6653.

DANIEL A. BENSON,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE;

No. 6662.

HENRY MERSEY ET AL.,
DEFENDANTS, APPELLANTS,
v.
UNITED STATES OF AMERICA,
APPELLEE;

No. 6666.

PATRICK B. MCGINNIS,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
MCENTEE and COFFIN, *Circuit Judges*.

Edward O. Proctor for George F. Glacy, appellant.

Claude B. Cross, with whom *John M. Reed* and *Withington, Cross, Park & McCann* were on brief, for Daniel A. Benson, appellant.

Edward F. Myers, with whom *Cornelius J. Sullivan* and *Holtz, Sullivan & Zonderman* were on brief, for Henry Mersey et al., appellants.

William T. Griffin, with whom *Lawrence R. Cohen* and *Newton H. Levee* were on brief, for Patrick B. McGinnis, appellant.

John F. Dougherty, Attorney, Department of Justice, with whom *Donald F. Turner*, Assistant Attorney General, *W. Arthur Garrity, Jr.*, United States Attorney, and *Howard E. Shapiro* and *Richard A. Wegman*, Attorneys, Department of Justice, were on brief, for appellee.

OPINION OF THE COURT.

May 25, 1966.

ALDRICH, *Chief Judge*. The defendants, McGinnis, Glacy, and Benson, president, vice-president in charge of finance and accounting, and vice-president in charge of operations, respectively, of the Boston & Maine Railroad, were convicted of misapplying[1] assets of the railroad. Defendants Mersey and International Railway Equipment Corporation, hereinafter collectively, Mersey,[2] were convicted of aiding and abetting. We will deal with the evidence later at more length. Briefly, the government showed that defendant officers presented to the railroad's board of directors a proposal to sell ten stainless steel passenger cars

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[1] "[E]mbezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property, or assets . . . or willfully or knowingly converts the same to his own use or to the use of another. . . ." 18 U.S.C. §660.

[2] Mersey was the principal officer and representative, as well as sole stockholder of International.

for $250,000, an unreasonably low price, and obtained approval by false statements of what similar cars were selling for; that they caused the cars to be sold for that price to Mersey, the railroad receiving payment only after Mersey had sold to another road which was already committed to buy for $425,000; that Mersey thereafter paid the defendant officers, individually and respectively, $35,000, $25,000 and $11,500, or a total of $71,500, much of which was actual proceeds of the sale.[3] All defendants moved unsuccessfully for a dismissal of Count 2 of the indictment, the one on which they were convicted,[4] and for directed verdicts of acquittal for joint and, in most instances, individual reasons. The appeals raise certain further issues.

A basic matter, which defendants presented in various manners,[5] is a supposed distinction between misapplying the cars and misapplying the proceeds. We are unimpressed, as was the district court, whose analysis of the issue and exposition to the jury was a model of simplicity and clarity.

The offense charged was the improper sale at a known inadequate price,[6] to a fraudulent middleman,[7] with de-

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[3] The fact that the proceeds could be specifically traced becomes relevant in a later matter, but does not enter into our decision that the offense was made out.

[4] Count 1, after having gone to the Supreme Court, *United States* v. *Boston & Maine R.R.*, 1965, 380 U.S. 157, was dismissed during trial.

[5] The defendants' attacks on the indictment, demands for particulars, motions for acquittal and a number of their refused requests for instructions, directly or indirectly raised this issue.

[6] It is this aspect of the case that distinguishes it from the state decisions cited by the defendants. We agree that the agents there entrusted to sell property, whether potatoes, watermelons, bonds, stock, automobiles, or spreaders, could not be convicted of conversion of the proceeds on a charge of converting the property. In

[7] (See opposite page.)

fendants' intended acquisition and retention of the proceeds, all part of the one grand design. The statute is not restricted to technical embezzlement, but embraces the broader concept of misapplication. *Cf. Batchelor* v. *United States,* 1895, 156 U.S. 426; *United States* v. *Mulloney,* D. Mass., 1934, 8 F. Supp. 674, *aff'd,* 79 F.2d 566, *cert. den.* 296 U.S. 658; *Kramer* v. *United States,* 4 Cir., 1951, 190 F.2d 712, 717-18. The defendant officers committed one underlying offense, violative of the statute, whether their action is sought to be broken down as depriving the railroad of the cars for less than they were worth, to their individual advantage, or as pocketing proceeds which, in law, belonged to the railroad.[8]

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those cases the sales were fully authorized. In the case at bar if defendants' only misconduct had been to intercept and pocket proceeds of an honest sale, the present indictment would have been inappropriate. But that is not this case. The defendants were charged with a larger offense. The district court's instruction laid this issue on the line.

> "If what these defendants did was bad judgment in selling the cars at the price for which they sold them, or was stupidity and nothing more, then they are not responsible. They have a wide degree of latitude in the exercise of their judgment. But willfulness means that they intended to do what they did, and did it voluntarily, and with a specific intent, or bad purpose, the bad purpose being to line their own pockets at the expense of the Boston and Maine."

The statement, made in oral argument by one of the defendants, that the "court put to the jury that the only question was whether the defendants converted the money," if the charge is taken as a whole is simply not so.

[7] Mersey, because he took title, objects to being described as a middleman. It is clear on the government's evidence, however, that the cars passed through him as part of the original scheme, in order to siphon off what rightly should have gone to the railroad.

[8] For this latter reason cases such as *Heath* v. *United States,* 9 Cir., 1954, 209 F.2d 318, and *Golden* v. *United States,* 1 Cir., 1963, 318 F.2d 357, are inapposite. In *Heath* it conclusively appeared that the property had ceased to be government property before it

The indictment fully sets out the statutory offense and the basic facts charged, so that neither the grand jury nor the defendants were misled. Count 2 of the indictment charges one offense, and the evidence abundantly supports it, unless there was some error as to its admission.

The defendants duly objected to the court's instruction to the jury, near the end of the government's case, that it was warranted in considering all the evidence against all the defendants. This raises the question whether sufficient concert among them was independently shown. *Lee Dip* v. *United States,* 9 Cir., 1937, 92 F.2d 802, *cert. den.* 303 U.S. 638; *United States* v. *Olweiss,* 2 Cir., 1943, 138 F.2d 798, *cert. den.* 321 U.S. 744.

Evidence introduced by the government and independently admissible, disclosed the following. In 1957, prior to the sale of the ten passenger cars, the railroad had sold two stainless steel dining cars to Bugbee, a Texas dealer in used railway equipment. Throughout this prior transaction the railroad acted through its employee, Bolton, who was the one regularly in charge of such matters. Bugbee resold the cars to the Wabash Railroad. All of these facts were known to all of the officer defendants. On April 30, 1958[9] Bugbee saw Bolton in Boston and indicated an interest in the passenger cars. Bolton replied that they were in use and not for sale. However, on request, he took Bugbee to Glacy. Bugbee inquired if he could have an option to purchase the cars for $500,000. Glacy refused. On April 29 Glacy had received from Benson, the defendant officer in charge of such matters, a current list of equipment available for sale. These cars were not on it. We

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was converted. In *Golden* the question was whether the property misapplied by the defendant had been delivered to him in his capacity as officer of the bank, or as a fiduciary for another.

[9] Unless otherwise noted, all dates refer to 1958.

now recite, under each defendant's name, evidence admissible at least against the stated defendant.

Mersey

Mersey's files contained a copy of Benson's "for-sale" list, dated, in Mersey's handwriting, April 30. On it was written in Mersey's handwriting, "add ten stainless cars," with a notation that Mersey was requesting prints. On May 10, after calling several times previously, Mersey reached Bugbee on the telephone, introduced himself, said he "owned" the ten cars, and offered to split with Bugbee whatever the latter could realize above $500,000. On June 25 Mersey telephoned Bugbee and reported that McGinnis had complained to Mersey that Wabash had tried to deal directly with McGinnis. Mersey stated that he had the situation in hand, and that he had told McGinnis so. Bugbee reported, in the same conversation, that Wabash would not pay more than $500,000. On July 17 Bugbee informed Mersey that Wabash's top price was $425,000.

The sale was voted on July 23, and consummated August 14. Between August 13 and December 16, Mersey made payments to the defendant officers totalling $71,500.

Glacy

Glacy, in early June, informed Bolton that the sale of the ten cars would not be handled by Bolton, but by Mersey. Bolton objected that it was his job, and raised Bugbee's prior interest. Glacy told Bolton that McGinnis wanted it handled this way. On June 26, the day after Bugbee had told Mersey that Wabash's top price was $500,000, Glacy stated in an office memorandum seeking Benson's pricing of the cars, that similar cars had been bought from the New York Central by Seaboard Airline for $20,000 to $22,000 after it had been "practically ready to buy these

coaches from us." In fact Seaboard had not been practically ready, had bought nothing from New York Central, and had bought cars, the nature of which did not appear, from the C & O for $84,000. On July 18, the day after Bugbee had told Mersey that Wabash's top figure was $425,000, Glacy informed Benson by office memorandum that he had an offer of $250,000, and requested Benson's approval. When the sale was consummated Glacy, upon releasing the cars, accepted a personal check post-dated by eight days. It was customary to require a certified check. The personal check exposed the railroad to serious risk. Mersey was already indebted to the railroad in the amount of $75,000 for a longer time than it was customary to permit, and had a bank balance of only $30,000.

Glacy received and collected payments on two checks, $12,500 each, drawn by Mersey on August 22 and 29.

Benson

Benson took Mersey to Bangor on April 30, the railroad paying the air fare. Since no railroad reason for Mersey's trip has been suggested, this indicates, at the least, some intimacy between Benson and Mersey. Benson's retained office copy of his "for-sale" list had a note attached stating that prints of the ten cars had been given Mersey on May 1. Benson, whose duties related to the sale and purchase of equipment, and who could be expected to be knowledgable, in giving Glacy a price of $30,000 on June 30, accepted Glacy's gross misstatement of the New York Central price. When Glacy, by subsequent memorandum, asked approval of $25,000 a car, Benson replied affirmatively, stating the cars were going to require heavy overhaul, at a cost of $25,000 apiece.

Benson received and collected payment on three checks drawn by Mersey on August 13, October 9, and December 16, for $5,000, $1,500, and $5,000, respectively.

McGinnis

It was McGinnis' custom, as president, to review the agenda for the directors meeting beforehand. The memorandum presented to the July 23 meeting requesting a vote on the sale of the ten cars did not name the buyer. Nor did it name the railroad officials who were endorsing the sale, but merely stated that it was recommended by "management." These lacunae were both contrary to standard practice. The sale was unanimously voted. In January 1962, McGinnis told an ICC investigator that he had been the one to present the sale to the directors. On the stand he denied this. Glacy and Benson were not directors, and if McGinnis had not sponsored the sale it does not appear who did.

McGinnis received and collected payment on three checks drawn by Mersey—two on October 10, each for $10,000, and one on December 3, for $15,000.

Each officer defendant took the stand and admitted, and sought to explain, receipt of the payments charged to him. Benson testified that his payments were for information and advice allegedly given Mersey in connection with other property Mersey had considered buying from the railroad. In making this explanation Benson, at the least, implicated himself as sufficiently intimate with Mersey to sell him information in clear breach of his fiduciary obligations to his employer.

Glacy testified that his two checks represented two years' salary for consulting services rendered to Mersey. The checks, ostensibly a week apart, were actually contiguous in the checkbook. On Glacy's testimony they represented a payment of the first year's salary nearly eight months later, and of the second year's salary four months prior to the end of the year. Furthermore, Glacy had previously received from Mersey appropriate compensation for the

first year's salary, assuming it was earned at all. As against Glacy's testimony, in January 1962 he had told an ICC inspector that he had never received payments of any description from Mersey or his company.

McGinnis testified that his payments from Mersey had been for services in connection with a transaction referred to as the Schiavone loan. The loan never went through. In January 1962 McGinnis told an ICC inspector that he had never received any payments from Mersey or his company, and specifically, that he had not received $35,000, and that although he had worked on the Schiavone loan, it had not materialized and he had received no fee. There were additional inconsistencies of record in McGinnis' courtroom explanations.

Mersey did not take the stand. His company records showed the various payments, but inconsistently with some of the defendant officers' testimony.

In sum, it could properly be found that each of the defendant officers consciously acted to facilitate the improper sale of the cars. Among other things, Glacy grossly misstated the circumstances of supposedly similar cars being bought by the Seaboard Airline; Benson, within whose expertise such matters lay, acquiesced in his statement, and in the price at which the Boston & Maine cars were ultimately sold; and McGinnis presented the matter of the sale to the board of directors in a significantly unorthodox manner. Even if there were merit in the defendant officers' contention that there was no direct evidence that any of them conspired with each other, a contention which leaves a number of matters unanswered, there was clear evidence that each conspired with Mersey. It was far too much of a coincidence, when events interlocked in the manner set forth, for the district court not to have been able to find that there was one conspiracy embracing all the defend-

ants, rather than three isolated bilateral agreements. The court's ruling was amply supported.

Only one further matter merits mention. Some of the testimony damaging to the defendants came from Bugbee, whose accounts of his telephone conversations with Mersey were reinforced by introduction of transcripts of recordings made by Bugbee without the knowledge, and hence consent, of Mersey. Defendants say that the transcripts are rendered inadmissible because their divulgence would violate 47 U.S.C. § 605, the arguably pertinent portion of which reads,

> "[N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communications to any person. . . ."

We agree with the reasoning of the court in *Carnes* v. *United States,* 5 Cir., 1961, 295 F.2d 598, *cert. den.* 369 U.S. 861, holding the transcripts admissible. This result accords not only with the decision of the court in *Rathbun* v. *United States,* 1957, 355 U.S. 107, but, we believe, with the minority opinion as well.

Affirmed.

Appendix C.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6652.

GEORGE F. GLACY,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

JUDGMENT
May 25, 1966

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
ROGER A. STINCHFIELD
Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 287

PATRICK B. McGINNIS,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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In the
Supreme Court of the United States

OCTOBER TERM, 1966

No.

PATRICK B. McGINNIS,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, Patrick B. McGinnis, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above case on May 25, 1966 (R. 1060).[1]

[1] Petitioner was indicted and tried together with Daniel A. Benson, George F. Glacy, International Railway Equipment Corporation ("International") and Henry Mersey. They were all convicted and the convictions were affirmed in the single judgment of the Circuit Court which is the subject of this petition. Benson and Glacy have filed separate petitions; and International and Mersey will file a single petition. A single record has been filed for all petitioners.

Citation to Opinion Below

The opinion of the Court of Appeals (R. 1051) is not yet reported. It is printed as Appendix A below at page 1a.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on May 25, 1966. (Appendix B, p. 11a *infra*). Petitioner filed a petition for rehearing (R. 1067; Appendix C, p. 12a *infra*) which was denied on June 10, 1966 (R. 1074; Appendix D, p. 19a *infra*). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

Questions Presented

1. In a so-called "wheel", criminal conspiracy case, is evidence of the acts or statements of one of the individual defendants (a "spoke") admissible against another spoke, where there is no evidence that the latter had any knowledge of any improper relationship of the aider and abettor (the "hub") with any other person or persons.
2. Were the payments received by the petitioner from International assets of the Boston & Maine Railroad within the meaning of 18 U.S.C. Section 660.
3. Did the indictment fairly apprise the petitioner of whether he was charged with misapplying *or* converting ten railroad cars *or* the sum of $35,000 *or* $71,500.
4. Did the Court of Appeals:

   (a) Impliedly reject the government's and the trial court's theory of the independent evidence admissible against the petitioner, Patrick B. McGinnis, to establish his participation in a joint plan, and

(b) Did it err in predicating its opinion on this point on hypotheses that were completely unwarranted and unsupported by the record under consideration.

5. Did the district court judge commit reversible error in the course of the trial:

(a) By admitting against petitioner hearsay evidence of the acts and statements of Glacy and Mersey;

(b) By giving a charge to the jury which contained errors of omission and commission.

Statute Involved

The statute involved is 18 U.S.C., Section 660 which is set forth as Appendix E at p. 20a below.

Statement of the Case

This is one of four petitions filed in behalf of five respective petitioners who were affected by the judgment of the Court of Appeals. The petition of Daniel A. Benson was the first to be entered and was accompanied by the record. There is a full statement of the case in the Benson petition at pages 3 to 11 inclusive. In the interest of brevity, this petitioner will not repeat those facts which are common to both petitioners but, rather, adopts and incorporates by reference the Benson statement. This statement will include only those matters which are peculiar to McGinnis or which are necessary to clarify or modify the Benson statement as it pertains to McGinnis.

I. Procedural

A. *The Indictment.*

Count Two of the indictment charges McGinnis specifically with the following acts:

(a) In May, 1958, he and Glacy instructed subordinates not to deal with Bugbee and that Mersey was to handle the sale of the 10 cars (R. 19).

(b) He voted to approve the sale and "directed that the coaches be transferred to International at a price of $250,000."

(c) On October 10, 1958, he received $20,000 from International and a further payment of $15,000 on December 3 of that year. He withheld these "moneys" from the B & M and retained them for his own account and use (R. 20).

B. *The Trial and Later Proceedings.*

In the course of the trial the following significant developments occurred:

(a) In its opening, the Government clearly limited the alleged crime to the misapplication and conversion of money, "$71,500 which rightfully and legally belonged to the Boston & Maine Railroad, in whose property they were dealing." (R. 43).

The prosecution also stated that the evidence would show that "Mr. Glacy and Mr. McGinnis instructed Mr. George Bolton that he was not to have any dealings with Mr. Bugbee . . . ." (R. 45).

(b) At the threshold of the evidence, the Court instructed the jury that evidence could be considered

only against the defendant as to whom it was offered and admitted subject to its being tied up at a later time. (R. 50-51).

(c) Almost at the close of the government's case, the trial court admitted all evidence against all defendants. (R. 349; 359, 685-686).

(d) At the close of the government's case, and again at the close of all the evidence, McGinnis moved for acquittal. These motions were denied. (R. 729 and 715).

(e) McGinnis also moved to strike certain evidence and for a mistrial. (R. 730 and 351). These were predicated on the theory that the Court should not have admitted much of the evidence against McGinnis (R. 351). He also moved to compel the government to elect between inconsistent allegations in the indictment (R. 731).

After the verdict, McGinnis renewed his motion for judgment of acquittal and, in the alternative, for a new trial.

II. Supplementary Statement of Facts Relating To McGinnis

A. Bolton.

On October 8, 1965, as its first witness of substance, the government called George H. Bolton. He testified about the visit of Bugbee on April 30 of 1958. Later, early in June, he had a conversation with Glacy about the ten cars. Glacy instructed him that the cars were to be sold to Mersey. When the witness offered "at the time I didn't like it and I questioned him about them," counsel for McGinnis objected. The Court then asked Bolton what he said on that occasion to which he replied, "I asked him

[Glacy] why. He told me that Mr. McGinnis wanted it handled in that manner." (R. 99)..

"Mr. Griffin: (For McGinnis) I move to strike out that answer as not binding on my client.

The Court: No, it is not binding to your client, but it is admissible in evidence as against Mr. Glacy. I can't strike it out.

Mr. Griffin: Would your Honor instruct the jury?

The Court: I could, but I won't at this time. I will at the right time." (R. 99).

The trial was suspended from October 8 to October 13.

On the latter date, Bolton resumed his testimony under direct examination by the attorney general. The following then occurred (R. 109-112):

"Q. And you testified that in this same conversation Mr. Glacy told you that Mr. McGinnis—

Mr. Griffin: I object to the repetition of this.

The Court: I think after four days' interruption, he is just bringing the witness up to the point where he wants to proceed.

Mr. Griffin: But I want to object to this statement as binding on Mr. McGinnis.

The Court: It is not binding on Mr. McGinnis and not received—

Mr. Dougherty: May I ask the question, and then approach the bench, your Honor?

The Court: Yes.

* * *

Q. Did you testify that in that same conversation Mr. Glacy told you that Mr. McGinnis had given an instruction that the ten coaches were to be sold by

Mr. Mersey's International Railway Equipment Corporation?

Mr. Griffin: Just a minute. I object to the form of that question, because that is not what the statement was at all.

The Court: I will let the witness answer as to that.

Q. Is that correct, sir? A. That is correct.

* * *

(Conference at the bench at which the following was recorded:

Mr. Dougherty: Your Honor, the government has felt that that statement by Mr. Glacy is admissible against Mr. McGinnis on the principle of agency, on the principle that it goes to the res gestae, on the principle that it is an admission, and on the principle that it constitutes a mere instruction. And we would like permission to submit to your Honor a brief on that point.

The Court: I will allow it de bene subject to what you have to say.

Mr. Griffin: I have to say that it is the merest hearsay.

The Court: It is merely hearsay, but—

Mr. Griffin: And incidentally highly prejudicial. In the light of this case, and the charges and the testimony, you couldn't have a statement more prejudicial to Mr. McGinnis.

Mr. Dougherty: Most admissions are prejudicial.

The Court: It is subject to your motion to strike later.

Mr. Griffin: And incidentally, I want to call your attention to the fact that in asking the question this morning the government has para-

phrased the answer in a different fashion. That wasn't it at all.

The Court: It is a question of fact. I can't decide that; that is for the jury.

Mr. Griffin: The testimony of Mr. Bolton as given was that Mr. McGinnis said he wanted it that way, and now he has put different words into the witness's mouth, that Mr. McGinnis instructed.

The Court: All right.

• • •

The Court: (To the jury): The Court has ruled now that this statement of Glacy is admissible as to Glacy as to what Glacy said. The Court does not say, . . : that it establishes the truth of the fact that Mr. McGinnis may or may not have said something or issued instructions or not.

It may be offered as against Glacy fully as something Glacy said. It is now received conditionally against McGinnis subject to further ruling of the Court.

Mr. Griffin: Note my exception to that, your Honor?

The Court: Yes."

Mr. Bolton was asked only four questions on cross-examination by counsel for McGinnis. He agreed that he had never had any direct communication with McGinnis concerning the sale of the ten coaches. Nor had he had any conversation on this subject with anyone in the presence of McGinnis. (R. 115-116).

B. Bugbee.

The government called Waldo L. Bugbee as a witness. While he was testifying on direct examination he was asked

about a conversation with Mersey in which there was reference to a talk between Mersey and McGinnis. On objection by counsel for McGinnis, the Court admitted the question as to Mersey and International. Bugbee then testified that Mersey had indicated that McGinnis had told the president of the Wabash that it should not be dealing directly with the B & M. (R. 199). Mersey also indicated that McGinnis had questioned him about having the sale of the cars in hand or could he manage them.

At this point, the Court ruled that the conversation was not being admitted against McGinnis, and the jury was so instructed (R. 200-201).

Mr. Bugbee's memory was often refreshed by reference to a document shown to him by counsel for the government.

He agreed that he did not know McGinnis and had never had any communication with him. (R. 204). After looking at a document, shown to him by counsel for McGinnis, Bugbee testified that what McGinnis was supposed to have said to the President of the Wabash was, "Why don't you come to me direct, you know we are getting rid of the passenger service, come to me direct and you can save some money." (R. 207-8).

At this point in the trial, counsel for McGinnis asked the Court if it would entertain motions to strike. The Court replied:

> "We will come to that when we come to it. I don't know how your cases are going to be tried, and if this develops into a joint venture it is a joint venture. If it does not develop into a joint venture, then it is individual." (R. 209).

On redirect examination, Bugbee was asked if he had a telephone recording device in May and June of 1958. (R. 246). On objection by counsel for McGinnis there was a

bench conference. (R. 247-249). At its conclusion, the Court ruled that it would permit the government to admit evidence of the recording device to show that a portion of cross examination was taken out of context but that it was not to be binding on McGinnis.

Bugbee continued to explain that his device recorded certain telephone conversations which would then be transcribed by his secretary and the transcripts were then filed. (R. 252).

Over objections of counsel for McGinnis, transcripts of conversations between Mersey and Bugbee, dated May 14 and June 25, 1958, were admitted against Mersey and International as records kept in the usual course of business (R. 253-4). (Exhs. 80 and 81, R. 825 and 829).

C. Bullis.

Maynard W. Bullis, clerk of the B & M, prepares the agenda for directors' meetings from suggestions submitted by the various departments. These are sent to the President for review. The president never changed an item. (R. 314). Item 5 on the agenda for July 23, 1958, refers to the sale of the ten cars. It was received from the operating department and was sent to McGinnis for approval. (R. 317).

At this point, on the opening of the 7th day of trial, the Court indicated, *sua sponte,* that it was inclined to rule that all evidence was admissible against all defendants. (R. 319).

Bullis resumed that McGinnis voted for the sale of the ten cars.

D. The Exhibits.

In the course of the trial numerous exhibits were admitted against other defendants, but not against McGinnis.

Most of the exhibits bore no mention of or reference to McGinnis. Many of those in which he is mentioned or of which he received a copy had no reference to the ten cars.

However, all the exhibits were ultimately admitted as against McGinnis.

E. The Ruling of the Court on Evidence.

The trial court ruled and charged that all the evidence that had been adduced could be considered against McGinnis. This was attacked by his counsel by way of objection, argument, a motion for a mistrial (R. 351), a motion to strike (R. 730), and requests for instructions to the jury.

Argument

I. The Trial Court Erred In Denying McGinnis' Motion To Dismiss the Indictment.

McGinnis' motion to dismiss the indictment as to Count Two was based on the following grounds, *inter alia*:

> (a) It "fails to allege facts which constitute a criminal offense against the United States." (Paragraph 11, R. 22).
>
> (b) It "is vague and uncertain, and fails to be or to contain a plain, concise and definite written statement of the essential facts constituting the offense or offenses sought to be charged." (Paragraph 14, R. 23).
>
> (c) It "states two inconsistent conclusions in paragraph 11 thereof." (Paragraph 15, R. 23).
>
> (d) It "does not adequately and fairly inform the defendant, Patrick B. McGinnis, of the offense or of-

fenses sought to be charged against him." (Paragraph 16, R. 23).

The vagueness and uncertainly of the indictment, and the inconsistency of the allegations of paragraph 11 thereof, are fully discussed in Point III at page 18 of the Benson petition. We adopt the argument advanced therein.

The Motion to Dismiss Count Two should have been allowed.

II. The Trial Court Erred In Admitting As Against McGinnis All the Evidence Originally Offered and Received Only As To Other Defendants.

At the close of the government's case, the trial court admitted as against all defendants all evidence which had been previously received against any defendant. In effect, this action constituted a determination that a *prima facie* showing of conspiracy had been made.

United States v. *Dennis,* 183 F.2d 201 (2nd Cir. 1950);
Carbo v. *United States,* 314 F.2d 718, 737 (9th Cir. 1963).

Evidence of the acts and declarations of other defendants could not be admitted against McGinnis unless (a) the existence of a conspiracy had been established and (b) McGinnis' participation in the conspiracy had been established.

Harney v. *United States,* 306 F.2d 523, 533 (1st Cir. 1962);
May v. *United States,* 175 F.2d 994, 1008 (D.C. Cir. 1949).

There was insufficient evidence to establish the participation of McGinnis in any conspiracy that existed. Such participation must be established by independent evidence.

Glasser v. *United States*, 315 U.S. 60, 74.

Put another way, McGinnis' connection with the alleged conspiracy cannot be established by the acts or declarations of other defendants in his absence. His participation should be shown by his own acts and declarations.

May v. *United States, supra*, at 175 F.2d 1007-1008.

The Court of Appeals appears to have been persuaded by this argument of the petitioner. In summarizing the evidence clearly admissible against McGinnis, the opinion makes no mention of the hearsay testimony of Bolton and Bugbee concerning statements of Glacy and Mersey respectively. Instead, the Circuit Court rests entirely on:

(a) The fact that the agenda did not follow "standard practice";

(b) That McGinnis, by a process of elimination, must have "sponsored" the sale of the ten cars (p. 7a *infra*);

(c) That McGinnis received money from International p. 8a *infra*); and

(d) That McGinnis presented the matter to the board in "a significantly unorthodox manner" (p. 9a *infra*).

Except for the payments, about which there was no dispute, the record is barren of any evidence to support these remarkable statements of the Court of Appeals. It is equally empty of the equally remarkable conclusion that there was clear evidence that McGinnis "conspired with Mersey" (p. 9a *infra*).

Petitioner called these matters to the attention of the Court of Appeals in his attempt to obtain a rehearing (pp. 14a-17a *infra*).

Even if McGinnis did see and approve item 5, this does not tend to show his connection with the alleged conspiracy. International was not mentioned in the agenda. His review of item 5, along with the rest of the agenda, was an ordinary part of his duties as President. No conclusion can be drawn from the fact that he approved the agenda, including item 5, since Bullis testified that McGinnis never had changed an item on an agenda, except to have it rewritten for clarification (R. 314). His "approval" was concerned with form rather than substance.

The testimony of Connor, that McGinnis stated that "he presented the matter to his board of directors on July 23, 1958" (R. 647), is entirely consistent with McGinnis' non-participation in the alleged conspiracy. The statement is, at most, ambiguous. One cannot infer from it that McGinnis urged the other directors to vote for that item. In fact, the undisputed testimony of Bullis, the government's witness, was that he could not recall any discussion of item 5 (R. 323).

Likewise, McGinnis' vote to approve the sale of the cars is not an unusual action which would indicate that he was a conspirator, especially in view of the fact that the vote was unanimous (R. 323).

There was no evidence of any meetings, correspondence, or conversations between McGinnis and any of the other alleged conspirators where the subject matter was probably discussed. This distinguishes the case at bar from those cases in which, although there was no direct evidence of a conspiracy, there was evidence of meetings from which a common plan could be inferred.

See *Harney* v. *United States, supra,* at 306 F.2d 530.

We rely heavily upon the decision in *Reiss* v. *United States,* 324 F.2d 680 (1st Cir. 1963), which reversed the conspiracy conviction of one Dole, on the grounds of insufficient evidence. There, the Court stated, at page 685:

> "With respect to [Dole] the government does no more than list a number of presumptively innocent actions. Unless such actions are in some way related so that they reflect upon each other, an accumulation of nothings is still nothing. Conspiracy cannot be established by mere inferences no more valid than others equally supported by reason and experience."

In the case at bar the independent evidence against McGinnis is likewise "no more than a number of presumptively innocent actions." There was no evidence that McGinnis was under a duty to scrutinize carefully the details of item 5 of the agenda. Nor was there anything in item 5 itself to suggest any wrongdoing. There was no evidence that McGinnis' actions at the directors' meeting were unusual or improper. The payment of $35,000 does not, in and of itself, appear improper, and there is no evidence that it was in any way connected with McGinnis' actions with regard to the sale of the cars. There was no independent evidence that McGinnis even knew that International was the prospective purchaser of the cars.

Even assuming, *arguendo,* that the evidence warranted a finding that (1) McGinnis and Mersey conspired to misapply B & M assets, and (2) either Glacy or Benson or both also conspired with Mersey, the Court would still not be justified in admitted the acts and statements of Glacy and Benson on the question of McGinnis' guilt. In support of this contention, we adopt and incorporate by reference the discussion of this in Point I at page 11 of the Benson petition.

III. The Trial Court Erred In Admitting Certain Specific Evidence As To McGinnis.

A. Documentary Evidence Originally Received Only Against Other Defendants.

Almost at the outset of the trial, the Trial Judge stated to the jury that certain documents would be offered and received only against certain defendants, and would not be evidence against the other defendants (R. 50-51). The overwhelming majority of the documentary exhibits were not originally offered or received against McGinnis. These documents were voluminous, numerous and bulky. They included checks, correspondence, memoranda, records, and ledgers.

Later, these documents were admitted en masse against McGinnis.

B. The Hearsay Testimony of Bolton and Bugbee

The details of the testimony of Bolton and Bugbee are set forth in the statement of the case, *supra*, at pages 5 to 10.

Bolton's testimony, and the transcripts of Bugbee's phone converstaions with Mersey (Ex. 80 and 81, R. 825-830) were included in McGinnis' Motion to Strike (R. 730). McGinnis' counsel also moved for a mistrial on the ground that the admission of these statements was unjustified (R. 351).

It is submitted that the admission of these declarations against McGinnis was highly prejudicial error.

We submit further than these conversations are, in effect, irrelevant. The only issue on which they have any bearing is the question of McGinnis' participation in the alleged common plan. Hearsay evidence in the form of declarations

of an alleged co-conspirator may *not* be used to prove the existence of the conspiracy. To do so would be to allow hearsay to "lift itself by its own bootstraps."

Glasser v. *United States,* 315 U.S. 60, 75.

In addition, there is the question of the dates of these alleged conversations, in May and June of 1958. Declarations of one co-conspirator prior to the formation of the conspiracy are not admissible against another alleged co-conspirator.

Christianson v. *United States,* 226 F.2d 646, 652 (8th Cir. 1955).

The first independent evidence against McGinnis was his actions with respect to the directors' meeting, late in July. The only evidence concerning McGinnis at the time of these declarations were the declarations themselves. And, as pointed out above, the declarations were not competent in in the absence of other, independent evidence concerning McGinnis' participation.

Exhibit 80 and 81 were hearsay on two grounds. First, as transcripts of telephone calls, they only purport to record what was stated in the alleged conversations. Second, Mersey's conversation, as recorded in Exhibit 80 (R. 825), was *itself* a hearsay statement of what McGinnis supposedly said. Thus, that portion of Exhibit 80 which contains Mersey's recount of his conversation with McGinnis is a hearsay record of Mersey's hearsay statement. The trial judge admitted the transcripts into evidence on the ground that they were records kept in the usual course of business (R. 253). We submit that the evidence is insufficient to support the characterization of these transcripts as business records for the purposes of the hearsay rule. But even if this contention is wrong, only *one* of

the two aspects of our objection would be removed. Mersey's statements, even if embodied in business records, were still hearsay, and should have been excluded.

There were numerous other objections to the admission of inadmissible testimony. (See e.g. R. 89-94; R. 186; R. 194 and 258; R. 279; and R. 296).

Many of these ruling constitute reversible error standing by themselves. Their cumulative effect was extremely damaging to the defense of McGinnis.

IV. The Payments Received By McGinnis From International Were Not Assets of the B & M Within the Meaning of the Statute.

Although the question has not yet been settled by this Court, we submit that the receipt of so-called kickbacks should not be held to be violative of 18 U.S.C. § 660. The decision of the Court of Appeals is irreconcilable with the reasoning in decisions under the banking statute, now 18 U.S.C. § 656, from which § 660 was derived.

This point is fully discussed in Point II at page 16 of the Benson petition. We adopt and incorporate by reference the argument advanced therein.

V. The Trial Court Erred In Refusing Certain of McGinnis' Requests For Instructions.

Several of the requests for instructions which the Trial Court declined to give dealt with the ownership of the moneys paid to McGinnis and the question of a common plan. These requests were made in an attempt to cure, if possible, errors which we submit the Trial Judge had made earlier.

Requests numbered 25 and 26 (R. 739) would have made clear to the jury that they could have believed McGinnis'

testimony without disbelieving that of Bolton and Bugbee. These requests involve reasoning which may not have been apparent to the laymen on the jury. In the absence of these instructions, the jury might have felt that the testimony compelled the conclusion that either McGinnis, on the one hand, or Bolton and Bugbee, on the other, were lying.

VI. Summary

The case at bar presents substantial questions concerning

(a) the interpretation of a federal statute, and
(b) evidentiary standards in conspiracy cases.

Further, the opinion of the Court of Appeals is irreconcilable with the reasoning in earlier decisions in cases in the First Circuit, as well as other circuits, interpreting a statute essentially similar to the statute here in question.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

William T. Griffin
Lawrence R. Cohen
Counsel for Petitioner

(Appendices follow)

Appendix A

United States Court of Appeals
For the First Circuit

No. 6652.

GEORGE F. GLACY,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE;

No. 6653.

DANIEL A. BENSON,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE;

No. 6662.

HENRY MERSEY ET AL.,
DEFENDANTS, APPELLANTS,
v.
UNITED STATES OF AMERICA,
APPELLEE;

No. 6666.

PATRICK B. McGINNIS,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Edward O. Proctor for George F. Glacy, appellant.

Claude B. Cross, with whom *John M. Reed* and *Withington, Cross, Park & McCann* were on brief, for Daniel A. Benson, appellant.

Edward F. Myers, with whom *Cornelius J. Sullivan* and *Holtz, Sullivan & Zonderman* were on brief, for Henry Mersey et al., appellants.

William T. Griffin, with whom *Lawrence R. Cohen* and *Newton H. Levee* were on brief, for Patrick B. McGinnis, appellant.

John F. Dougherty, Attorney, Department of Justice, with whom *Donald F. Turner*, Assistant Attorney General, *W. Arthur Garrity, Jr.*, United States Attorney, and *Howard E. Shapiro* and *Richard A. Wegman*, Attorneys, Department of Justice, were on brief, for appellee.

OPINION OF THE COURT.

May 25, 1966.

ALDRICH, *Chief Judge*. The defendants, McGinnis, Glacy, and Benson, president, vice-president in charge of finance and accounting, and vice-president in charge of operations, respectively, of the Boston & Maine Railroad, were convicted of misapplying [1] assets of the railroad. Defendants Mersey and International Railway Equipment Corporation, hereinafter collectively, Mersey,[2] were convicted of aiding and abetting. We will deal with the evidence later at more length. Briefly, the government showed that defendant officers presented to the railroad's board of directors a proposal to sell ten stainless steel passenger cars for $250,000, an unreasonably low price, and obtained approval by false statements of what similar cars were selling for; that they caused the cars to be sold for that price to Mersey, the railroad receiving payment only after Mersey had sold to another road which was already committed to buy for $425,000; that Mersey thereafter paid the defendant officers, individually and respectively, $35,000,

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[1] "[E]mbezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property, or assets . . . or willfully or knowingly converts the same to his own use or to the use of another . . . ." 18 U.S.C. §660.

[2] Mersey was the principal officer and representative, as well as sole stockholder of International.

$25,000 and $11,500, or a total of $71,500, much of which was actual proceeds of the sale.[3] All defendants moved unsuccessfully for a dismissal of Count 2 of the indictment, the one on which they were convicted,[4] and for directed verdicts of acquittal for joint and, in most instances, individual reasons. The appeals raise certain further issues.

A basic matter, which defendants presented in various manners,[5] is a supposed distinction between misapplying the cars and misapplying the proceeds. We are unimpressed, as was the district court, whose analysis of the issue and exposition to the jury was a model of simplicity and clarity.

The offense charged was the improper sale at a known inadequate price,[6] to a fraudulent middleman,[7] with defendants' intended acquisition and retention of the proceeds, all part of the one grand design. The statute is not restricted to technical embezzlement, but embraces the

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[3] The fact that the proceeds could be specifically traced becomes relevant in a later matter, but does not enter into our decision that the offense was made out.

[4] Count 1, after having gone to the Supreme Court, *United States* v. *Boston & Maine R.R.*, 1965, 380 U.S. 157, was dismissed during trial.

[5] The defendants' attacks on the indictment, demands for particulars, motions for acquittal and a number of their refused requests for instructions, directly or indirectly raised this issue.

[6] It is this aspect of the case that distinguishes it from the state decisions cited by the defendants. We agree that the agents there entrusted to sell property, whether potatoes, watermelons, bonds, stock, automobiles, or spreaders, could not be convicted of conversion of the proceeds on a charge of converting the property. In those cases the sales were fully authorized. In the case at bar if defendants' only misconduct had been to intercept and pocket proceeds of an honest sale, the present indictment would have been inappropriate. But that is not this case. The defendants were charged with a larger offense. The district court's instruction laid this issue on the line.

> "If what these defendants did was bad judgment in selling the cars at the price for which they sold them, or was stupidity and nothing more, then they are not responsible. They have a wide degree of latitude in the exercise of their judgment. But will-

broader concept of misapplication. *Cf. Batchelor* v. *United States,* 1895, 156 U.S. 426; *United States* v. *Mulloney,* D. Mass., 1934, 8 F. Supp. 674, *aff'd,* 79 F.2d 566, *cert. den.* 296 U.S. 658; *Kramer* v. *United States,* 4 Cir., 1951, 190 F.2d 712, 717-18. The defendant officers committed one underlying offense, violative of the statute, whether their action is sought to be broken down as depriving the railroad of the cars for less than they were worth, to their individual advantage, or as pocketing proceeds which, in law, belonged to the railroad.[8]

The indictment fully sets out the statutory offense and the basic facts charged, so that neither the grand jury nor the defendants were misled. Count 2 of the indictment charges one offense, and the evidence abundantly supports it, unless there was some error as to its admission.

The defendants duly objected to the court's instruction to the jury, near the end of the government's case, that it was warranted in considering all the evidence against all the defendants. This raises the question whether sufficient concert among them was independently shown. *Lee Dip* v. *United States,* 9 Cir., 1937, 92 F.2d 802, *cert. den.* 303

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fulness means that they intended to do what they did, and did it voluntarily, and with a specific intent, or bad purpose, the bad purpose being to line their own pockets at the expense of the Boston and Maine."

The statement, made in oral argument by one of the defendants, that the "court put to the jury that the only question was whether the defendants converted the money," if the charge is taken as a whole is simply not so.

[7] Mersey, because he took title, objects to being described as a middleman. It is clear on the government's evidence, however, that the cars passed through him as part of the original scheme, in order to siphon off what rightly should have gone to the railroad.

[8] For this latter reason cases such as *Heath* v. *United States,* 9 Cir., 1954, 209 F.2d 318, and *Golden* v. *United States,* 1 Cir., 1963, 318 F.2d 357, are inapposite. In *Heath* it conclusively appeared that the property had ceased to be government property before it was converted. In *Golden* the question was whether the property misapplied by the defendant had been delivered to him in his capacity as officer of the bank, or as a fiduciary for another.

U.S. 638; *United States* v. *Olweiss*, 2 Cir., 1943, 138 F.2d 798, *cert. den.* 321 U.S. 744.

Evidence introduced by the government and independently admissible, disclosed the following. In 1957, prior to the sale of the ten passenger cars, the railroad had sold two stainless steel dining cars to Bugbee, a Texas dealer in used railway equipment. Throughout this prior transaction the railroad acted through its employee, Bolton, who was the one regularly in charge of such matters. Bugbee resold the cars to the Wabash Railroad. All of these facts were known to all of the officer defendants. On April 30, 1958 [9] Bugbee saw Bolton in Boston and indicated an interest in the passenger cars. Bolton replied that they were in use and not for sale. However, on request, he took Bugbee to Glacy. Bugbee inquired if he could have an option to purchase the cars for $500,000. Glacy refused. On April 29 Glacy had received from Benson, the defendant officer in charge of such matters, a current list of equipment available for sale. These cars were not on it. We now recite, under each defendant's name, evidence admissible at least against the stated defendant.

Mersey

Mersey's files contained a copy of Benson's "for-sale" list, dated, in Mersey's handwriting, April 30. On it was written in Mersey's handwriting, "add ten stainless cars," with a notation that Mersey was requesting prints. On May 10, after calling several times previously, Mersey reached Bugbee on the telephone, introduced himself, said he "owned" the ten cars, and offered to split with Bugbee whatever the latter could realize above $500,000. On June 25 Mersey telephoned Bugbee and reported that McGinnis had complained to Mersey that Wabash had tried to deal

[9] Unless otherwise noted, all dates refer to 1958.

directly with McGinnis. Mersey stated that he had the situation in hand, and that he had told McGinnis so. Bugbee reported, in the same conversation, that Wabash would not pay more than $500,000. On July 17 Bugbee informed Mersey that Wabash's top price was $425,000.

The sale was voted on July 23, and consummated August 14. Between August 13 and December 16, Mersey made payments to the defendant officers totalling $71,500.

Glacy

Glacy, in early June, informed Bolton that the sale of the ten cars would not be handled by Bolton, but by Mersey. Bolton objected that it was his job, and raised Bugbee's prior interest. Glacy told Bolton that McGinnis wanted it handled this way. On June 26, the day after Bugbee had told Mersey that Wabash's top price was $500,000, Glacy stated in an office memorandum seeking Benson's pricing of the cars, that similar cars had been bought from the New York Central by Seaboard Airline for $20,000 to $22,000 after it had been "practically ready to buy these coaches from us." In fact Seaboard had not been practically ready, had bought nothing from New York Central, and had bought cars, the nature of which did not appear, from the C & O for $84,000. On July 18, the day after Bugbee had told Mersey that Wabash's top figure was $425,000, Glacy informed Benson by office memorandum that he had an offer of $250,000, and requested Benson's approval. When the sale was consummated Glacy, upon releasing the cars, accepted a personal check post-dated by eight days. It was customary to require a certified check. The personal check exposed the railroad to serious risk. Mersey was already indebted to the railroad in the amount of $75,000 for a longer time than it was customary to permit, and had a bank balance of only $30,000.

Glacy received and collected payments on two checks, $12,500 each, drawn by Mersey on August 22 and 29.

Benson

Benson took Mersey to Bangor on April 30, the railroad paying the air fare. Since no railroad reason for Mersey's trip has been suggested, this indicates, at the least, some intimacy between Benson and Mersey. Benson's retained office copy of his "for-sale" list had a note attached stating that prints of the ten cars had been given Mersey on May 1. Benson, whose duties related to the sale and purchase of equipment, and who could be expected to be knowledgable, in giving Glacy a price of $30,000 on June 30, accepted Glacy's gross misstatement of the New York Central price. When Glacy, by subsequent memorandum, asked approval of $25,000 a car, Benson replied affirmatively, stating the cars were going to require heavy overhaul, at a cost of $25,000 apiece.

Benson received and collected payment on three checks drawn by Mersey on August 13, October 9, and December 16, for $5,000, $1,500, and $5,000, respectively.

McGinnis

It was McGinnis' custom, as president, to review the agenda for the directors meeting beforehand. The memorandum presented to the July 23 meeting requesting a vote on the sale of the ten cars did not name the buyer. Nor did it name the railroad officials who were endorsing the sale, but merely stated that it was recommended by "management." These lacunae were both contrary to standard practice. The sale was unanimously voted. In January 1962, McGinnis told an ICC investigator that he had been the one to present the sale to the directors. On the stand he denied this. Glacy and Benson were not directors, and if McGinnis had not sponsored the sale it does not appear who did.

McGinnis received and collected payment on three checks drawn by Mersey—two on October 10, each for $10,000, and one on December 3, for $15,000.

Each officer defendant took the stand and admitted, and sought to explain, receipt of the payments charged to him. Benson testified that his payments were for information and advice allegedly given Mersey in connection with other property Mersey had considered buying from the railroad. In making this explanation Benson, at the least, implicated himself as sufficiently intimate with Mersey to sell him information in clear breach of his fiduciary obligations to his employer.

Glacy testified that his two checks represented two years' salary for consulting services rendered to Mersey. The checks, ostensibly a week apart, were actually contiguous in the checkbook. On Glacy's testimony they represented a payment of the first year's salary nearly eight months later, and of the second year's salary four months prior to the end of the year. Furthermore, Glacy had previously received from Mersey appropriate compensation for the first year's salary, assuming it was earned at all. As against Glacy's testimony, in January 1962 he had told an ICC inspector that he had never received payments of any description from Mersey or his company.

McGinnis testified that his payments from Mersey had been for services in connection with a transaction referred to as the Schiavone loan. The loan never went through. In January 1962 McGinnis told an ICC inspector that he had never received any payments from Mersey or his company, and specifically, that he had not received $35,000, and that although he had worked on the Schiavone loan, it had not materialized and he had received no fee. There were additional inconsistencies of record in McGinnis' courtroom explanations.

Mersey did not take the stand. His company records showed the various payments, but inconsistently with some of the defendant officers' testimony.

In sum, it could properly be found that each of the defendant officers consciously acted to facilitate the improper sale of the cars. Among other things, Glacy grossly misstated the circumstances of supposedly similar cars being bought by the Seaboard Airline; Benson, within whose expertise such matters lay, acquiesced in his statement, and in the price at which the Boston & Maine cars were ultimately sold; and McGinnis presented the matter of the sale to the board of directors in a significantly unorthodox manner. Even if there were merit in the defendant officers' contention that there was no direct evidence that any of them conspired with each other, a contention which leaves a number of matters unanswered, there was clear evidence that each conspired with Mersey. It was far too much of a coincidence, when events interlocked in the manner set forth, for the district court not to have been able to find that there was one conspiracy embracing all the defendants, rather than three isolated bilateral agreements. The court's ruling was amply supported.

Only one further matter merits mention. Some of the testimony damaging to the defendants came from Bugbee, whose accounts of his telephone conversations with Mersey were reinforced by introduction of transcripts of recordings made by Bugbee without the knowledge, and hence consent, of Mersey. Defendants say that the transcripts are rendered inadmissible because their divulgence would violate 47 U.S.C. § 605, the arguably pertinent portion of which reads,

> "[N]o person not being authorized by the sender shall intercept any communication and divulge or publish

the existence, contents, substance, purport, effect, or meaning of such intercepted communications to any person . . . ."

We agree with the reasoning of the court in *Carnes* v. *United States*, 5 Cir., 1961, 295 F.2d 598, *cert. den.* 369 U.S. 861, holding the transcripts admissible. This result accords not only with the decision of the court in *Rathbun* v. *United States*, 1957, 355 U.S. 107, but, we believe, with the minority opinion as well.

Affirmed.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6666.

PATRICK B. McGINNIS,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

JUDGMENT
May 25, 1966

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
(s) ROGER A. STINCHFIELD
Clerk.

Appendix C

United States Court of Appeals
For the First Circuit

No. 6666.

PATRICK B. McGINNIS,
DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,
APPELLEE.

PETITION FOR REHEARING

Now comes the defendant, appellant, Patrick B. McGinnis, and petitions this Court for a rehearing of the above case, predicated on the judgment and opinion of this Court entered on May 25, 1966. The defendant, appellant assigns the following grounds in support of this petition:

I. In holding that the indictment fully sets out the statutory offense and the basic facts charged, the Court states, at page 3 of the opinion, that it is "unimpressed" by the question of the distinction between misapplying the cars and misapplying the proceeds. The Court goes on to say that the offense charged was the improper sale at a *known inadequate* price to a fraudulent middleman, with defendants' intended acquisition and retention of the proceeds, all part of the one grand design. It is submitted

that paragraphs 11, 12 and 13, the "charging" portion of the Indictment (R. 18-20), contain no language which can fairly be interpreted as alleging that $250,000 was an inadequate price, or that McGinnis had any reason to suspect that the price was inadequate. The record contains no evidence that the price was inadequate. In fact, the only attempt to establish the fair value of the cars was made by the defendant Benson, and the proffered testimony of his expert witness was excluded on the grounds of insufficent familiarity with the sale of similar cars at or about the same time (R. 552).

At page 4 of the opinion, the Court states that the defendants committed one offense, whether their action is sought to be broken down as depriving the railroad of the cars for less than they were worth, or as pocketing proceeds which, in law, belonged to the railroad. In effect, the Court has ruled that the defendants' argument that the $71,500 could not be found to be B & M property is unavailing, because they could have been found guilty of misapplying the cars, rather than the money.

In so ruling, the Court has rejected the theory under which the government tried the case and upon which it relied in its brief, and has adopted instead a theory which the government has expressly disavowed. At the outset of the trial, in the government's opening, the Attorney General stated that the violation of Section 660 arose from the misapplication and conversion of "the $71,500 which International Railway Equipment Corporation paid to them out of the $425,000 which it got by reselling the cars to the Wabash Railroad, $71,500 which rightfully and legally belonged to the Boston & Maine Railroad, in whose property they were dealing". (R. 43).

At page 2 of the government's brief, under the heading "Counterstatement of Questions Presented", appears the following:

"2. Where defendant is indicted and convicted for misapplying *the proceeds* from the sale of property of the Boston and Maine Railroad, is a technical finding of legal ownership of such proceeds in the Boston & Maine Railroad essential to such a conviction?" (Emphasis added)

At page 20 of its brief, the government states that "their wrongful act consisted *solely* of what they did with the proceeds after the cars were sold." (Emphasis added).

Any doubts as to the government's theory of the case are dispelled by the following statement at page 19 of its brief:

"That answer is that Paragraphs 12 and 13 of the indictment, as well as the last clause of Paragraph 11, *in fact* apprise defendants that it is the *proceeds* from the sale of the ten cars, and *not* the cars themselves, that constitutes the object of the alleged wrongful misapplication." (Emphasis in original).

By adopting a theory which was expressly rejected by the government, the Court has enabled the defendants' conviction to rest on one point and the affirmance to rest on another. That this is an evil was recognized in *Russell* v. *United States,* 369 U.S. 749, 766 (1962). We submit that justice requires, at the very least, an opportunity for the defendants to present arguments on the sufficiency of the indictment and the evidence to sustain their convictions under the theory which the Court has adopted.

II. In holding that the District Judge was correct in instructing the jury, near the end of the government's case, that it was warranted in considering all the evidence against all the defendants, the Court has ruled that sufficient concert among them was independently shown. It is submitted that in making such ruling, the Court has considered evidence which, as to McGinnis, was not independently admissible, and has made statements of fact

which are contrary to or unsupported by the evidence adduced at the trial.

At page 5 of the opinion, the Court states that the following facts, *inter alia*, were shown by independently admissible evidence:

> "On April 30, 1958, Bugbee saw Bolton in Boston and indicated an interest in the passenger cars. Bolton replied that they were in use and not for sale. However, on request, he took Bugbee to Glacy. Bugbee inquired if he could have an option to purchase the cars for $500,000. Glacy refused. On April 29, Glacy had received from Benson, the defendant officer in charge of such matters, a current list of equipment available for sale. These cars were not on it."

There is nothing in the record to show that McGinnis participated in any of these acts, or was even aware that they were taking place. As to him, this was not independent evidence.

At page 7 of the Opinion, the Court summarizes the evidence independently admissible against McGinnis. The Court first discusses the matter of the agenda for the directors' meeting (Ex. 89). This does not name the buyer, nor did it name the railroad officials who were endorsing the sale, but stated that it was recommended by "management". The Court states that "these lacunae were both contrary to standard practice". This statement is, we submit, wholly unsupported by the record, which contains no testimony whatsoever as to "standard practice" in these matters. The practice followed at directors' meetings was testified to by Maynard W. Bullis, the clerk of the B & M. His testimony, which appears at pages 312 to 318 and 323 to 333 of the record appendix, contains no

reference to the practice with regard to identifying purchasers and proponents in the agenda.

The only evidence which could possibly be construed as indicating a "standard practice" is the agenda for the July 23 meeting, Exhibit 89. Even assuming, *arguendo*, that this agenda for one meeting might be considered evidence of a "standard practice", it does not support the Court's statement.

The agenda is broken down into several schedules, each proposing a specific transaction. Schedules A-1 through A-28 concern proposed real estate transactions. Schedule B concerns Supplemental Indentures. Schedule C concerns a request for refunds from the Old Colony Trust Co. Schedule D concerns the proposed sale of the 10 cars.

With respect to identification of purchasers, it is true that the items in Schedule A identify the proposed grantee of the real estate interest. However, there is a meaningful distinction between the sale of real estate and of chattels. This Court is no doubt aware of the high degree of precision and attention to detail prevalent in the practice of real estate conveyancing. We suggest that the inclusion of the buyer's name in the corporate vote (and thus in the agenda) might well reflect the normal insistence of the purchasers' attorney that the corporate vote authorizing the sale describe the transaction with as much precision as possible. We submit that, absent some evidence of other agenda items relating to the *sale of chattels,* it is unreasonable to assume that such items should contain the purchaser's name as a matter of "standard practice".

With respect to identifying by name the railroad officials who were recommending the sale, the Court's conclusion is directly contradicted by the evidence. Not once in Schedules A-1 through A-28 are the endorsing officials named. Instead, they are referred to as "all interested departments

of the railroad", "the Real Estate Group", "the Industrial Development Department" or "management". That is precisely what was done in Schedule D, the item in question.

The Court then states that McGinnis told an ICC investigator that he had been the one to present the sale to the directors. This testimony, by Connors, the ICC investigator, was presented in rebuttal, after the government and the defendants had rested (R. 647). It could properly be used only to rebut McGinnis testimony, and not to establish a proposition on which the government had the burden of proof. Certainly, it could not have been taken into account by the trial judge in his ruling on the government motion to connect evidence, since that ruling had been made well in advance of Connors' testimony (R. 359).

The Court states that Glacy and Benson were not directors, " and if McGinnis hadn't sponsored the sale it does not appear who did". This statement, which assumes that one of the three alleged conspirators *must* have sponsored the sale, and that, in the absence of contrary evidence, it was McGinnis, disregards the government's obligation to prove its case. In addition, the statement is incorrect, because it *does* appear "who did" present the sale. Bullis testified that the chairman of the board, Mr. Appleton, brought each item before the board, and that he, Bullis, could recall no discussion of this or any other item by any of the directors (R. 318 and 323.)

At page 9 of the Opinion, the Court summarizes the evidence against each defendant on the question of participation in the conspiracy. The Opinion states that "McGinnis presented the matter of the sale to the board of directors in a significantly unorthodox manner". This statement is wholly unwarranted.

For all of the above reasons, we submit that this Court should grant a rehearing of this case.

Respectfully submitted,

WILLIAM T. GRIFFIN

LAWRENCE R. COHEN
Attorneys for the defendant, appellant, Patrick B. McGinnis.

CERTIFICATE

We, William T. Griffin and Lawrence R. Cohen, counsel for the defendant, appellant, Patrick B. McGinnis, certify that the foregoing Petition for Rehearing is presented in good faith and not for purposes of delay.

WILLIAM T. GRIFFIN

LAWRENCE R. COHEN
Attorneys for defendant, appellant, Patrick B. McGinnis.

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6666.

PATRICK B. McGINNIS,
DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,
APPELLEE.

ORDER OF COURT

June 10, 1966.

It is ordered that the petition for rehearing filed June 8, 1966, be, and the same hereby is, denied.

By the Court:

(s) ROGER A. STINCHFIELD
Clerk.

Appendix E

18 U.S.C. § 660. CARRIER'S FUNDS DERIVED FROM COMMERCE; STATE PROSECUTIONS

Whoever, being a president, director, officer, or manager of any firm, association, or corporation engaged in commerce as a common carrier, or whoever, being an employee of such common carrier riding in or upon any railroad car, motortruck, steamboat, vessel, aircraft or other vehicle of such carrier moving in interstate commerce, embezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property, or assets of such firm, association, or corporation arising or accruing from, or used in, such commerce, in whole or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred but also in any district in which the defendant may have taken or had possession of such moneys, funds, credits, securities, property or assets.

A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution hereunder for the same act or acts. June 25, 1948, c. 645, 62 Stat. 730.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 288

HENRY MERSEY & INTERNATIONAL RAILROAD EQUIPMENT CORPORATION,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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In the
Supreme Court of the United States

OCTOBER TERM, 1966

No.

HENRY MERSEY & INTERNATIONAL RAILROAD EQUIPMENT CORPORATION,

PETITIONERS,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners Henry Mersey and International Railroad Equipment Corporation pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above case on May 25, 1966. (R. 1060).

Citation to Opinion Below

The opinion of the Court of Appeals (R. 1051) is not yet reported. It is printed as Appendix A below, P. 1a.

Petition for Rehearing

A petition for rehearing was filed on June 8, 1966. The petition was denied on June 10, 1966. It is printed as Appendix B below.

The Statute Which the Case Involves

The texts of the statutes which the case involves are set forth in Appendix C. (18 U.S.C. 2, 18 U.S.C. 660, 47 U.S.C. 605)

Jurisdiction

The judgment of the Court of Appeals was entered on May 25, 1966. P. 11a *infra*, Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The filing of the petition is governed by Rule 22(2) of the Rules of this Court.

Questions Presented

The Petitioners, Henry Mersey and International Railroad Equipment Corporation, respectfully adopt questions 1, 2 and 3 presented in the petition for writ of certiorari of Daniel A. Benson (p. 2) and incorporate the same by reference as part of this petition in addition to the following:

1. Whether monies paid by the individual defendant and the corporate defendant herein to three (3) other co-defendants who were tried jointly with this individual defendant and this corporate defendant, which monies in the words of the Trial Court (R700) in his charge to the jury were "monies

of International Railroad Equipment Corporation" were also monies of a common carrier (Boston and Maine Railroad) within the meaning of the penal statute (18 U.S.C. 660) for violation of which the individual and corporate defendants herein were convicted as aiders and abetters. (18 U.S.C. 2)

2. Whether the rule of strict construction of a penal statute (18 U.S.C. 660) will permit the conviction of the individual and corporate defendants herein for misapplication of certain monies of a common carrier, when the common carrier had neither possession of nor ownership of the monies at the time of the misapplication, but at best only an equitable claim or right, a right to an accounting or some other right accruing to a creditor out of a creditor-debtor relationship.

3. Whether the rule of strict construction of a penal statute permits the conviction of an individual defendant and of a corporate defendant, (the individual defendant being the sole owner of the corporate defendant), for the payment of monies belonging to the corporate defendant to certain officials of a common carrier as kickbacks for their role in arranging and permitting a transaction in which ten (10) cars of the carrier were sold to the corporate defendant herein by the carrier for $250,000, and resold by the corporate defendant to a third party for $425,000.00, and where all but $5,000 of the $71,500 in kickback monies appeared to come from the proceeds of the resale to the third party.

4. Whether incriminating evidence of acts and statements made by the individual and corporate defendants herein and their co-defendants at times prior to August 14, 1958, and admitted into evidence against

the individual defendant and the corporate defendant during trial of the case, when the indictment limited the role of the individual corporation and the corporate defendant herein to aiding and abetting three (3) principal defendants between August 14, 1958 and December 16, 1958, constituted such a variance between the proof and the allegations of the indictment as to affect the substantial rights of the accused defendants herein.

5. Whether in light of a conflict in view among various Circuit Courts of Appeal transcripts of recordings made by one party to certain telephone conversations by means of a device attached to that party's telephone without the knowledge and consent of the accused individual defendant herein, who was the other party to the said conversations, were rendered inadmissable as a violation of 47 U.S.C., Section 605.

Statement of the Case

The Petitioners herein respectfully adopt the statement of the case presented in the petition of Daniel A. Benson, (pp. 3-11) and incorporate the same by reference as part of this petition.

Reasons For Granting the Writ

The Petitioners herein respectfully adopt the reasons presented in the petition for certiorari of Daniel A. Benson (pp. 11-21) and incorporate the same by reference as part of this petition in addition to the following:

I. *The problem of the degree of proprietorship, interest or ownership in the subject matter of misapplication required by the statute.*

Granted as pointed out by the Circuit Court of Appeals (Opinion R———) that, "The statute is not restricted to technical embezzlement but embraces the broad concept of misapplication," the common carrier must still have some degree of proprietary or possessory interest in the subject matter misapplied to satisfy the rule of strict construction of criminal statutes in favor of the accused.

The case was clearly presented to the jury by the Government as one in which $71,500 received by defendants McGinnis, Glacy and Benson from International and Mersey was the subject matter of the misapplication: (R. 43) It was presented to the jury by the Court on the theory that the three principal defendants were corporate fiduciaries who were charged with making personal gains out of the sale and subsequent resale of 10 stainless steel coaches belonging to the Boston and Maine Railroad, the gains to the corporate official being the total sum of $71,500, most of which came from the proceeds of the resale. (R. 683) Later on in the charge, the Court made it specifically clear that the monies paid by Wabash as the purchase price of the 10 cars became the "monies of International Railroad Equipment Corporation". (R. 700)

The reports of this Court and Courts under the supervision of this Court are replete with cases based upon Federal statutes interdicting theft, embezzlement and misapplication of property from a specified category of owner. All such cases seem to require an interest in the subject matter that goes beyond the existence of a creditor-debtor relationship or the duty to account.

For example, in *U.S.* v. *Johnston,* (267 U.S. 220), the defendant had been convicted of embezzling money of the United States in that he had failed to make a return to the Collector of Internal Revenue of the tax upon admission fees for certain boxing matches he had promoted. In affirming a dismissal of charges, Mr. Justice Holmes pointed out that the defendant's relationship to the United States was that of a debtor, not a bailee, and the debtor-creditor relationship was insufficient to support a conviction for embezzlement.

In *Heath* v. *United States,* 209 F. 2nd 318, 9 Cir. 1954, the defendant was convicted of willfully converting and selling property of the United States in violation of Section 641. Inasmuch as it appeared from the record that title to the property converted had already passed to a consignee prior to the act of conversion, the conviction of Heath was reversed on the theory that there was a fatal variance between the allegations of the indictment and the proof.

Only this Court can decide by granting certiorari to what extent a constructive offense can be established under 18 U.S.C. Section 660.

II. *The problem of the admissibility of certain transcripts of telephone conversations in violation of 47 U.S.C. 605.*

Waldo E. Bugbee, a Government witness, testified that on May 14, 1958 (R. 190) and again on June 25, 1958 (R. 199) he was a party to inter-state telephone conversations with the defendant Mersey. The telephone call of May 14 was from Mersey to Bugbee. The telephone call of June 25 was from Bugbee to Mersey.

Bugbee testified further that he had a recording device attached to his telephone (R. 249) and that it was his cus-

tom to record telephone conversations by means of this device that related to "prices and quotations, and to sales and negotiations on equipment." (R. 251) It was a further practice of the office for Bugbee's secretary to make a stenographic transcript of each such recorded conversation and to place each such transcript in the files. (R. 251 and 252) The original discs upon which the telephone conversations were recorded were discarded. (R. 252)

The typewritten transcript of the conversation of May 14, 1958 was admitted into evidence as Government Exhibit 81 and the typewritten transcript of the conversation of June 25, 1958 was admitted into evidence as Government Exhibit 80 (R. 252, 253, 254, 825 and 829) against defendants Mersey and International over appropriate exceptions and motions raising the question of a violation of Section 605 of the Communications Act (47 U.S.C. 605). In affirming the admission of the transcripts, First Circuit Court of Appeals adopted the reasoning of the Court in *Carnes* v. *United States,* 5, Cir., 1961, 295 F. 2nd 598, *Cert. den.* 369 U.S. 861 and held that their admission was in accord with the decision of this Court, in *Rathbun* v. *United States,* 1957, 355 U.S. 107.

Yet Rathbun was decided on the theory that eavesdropping by police officers on a regularly-used telephone extension line was not an unauthorized interception within the meaning of Section 605. Relying upon the Rathbun case some Courts have held recording of a telephone conversation by placing an induction coil next to a home telephone was not an interception within the meaning of the Act, *Carbo* v. *United States,* 314 F. 2nd 718, *cert. denied, Palermo* v. *United States,* 377 U.S. 953. Other courts have held that the recording of a telephone conversation by use of the induction coil and not by direct attachment to the telephone or the telephone line would constitute an intercep-

tion within the prohibition of the Act, *United States* v. *Laughlin,* 223, F. Supp. 623.

None of the fact situations presented in the above cases are determinative of the material facts here. The Mersey-Bugbee conversations were not transcribed by a secretary listening in on an extension line. Nor was a detectophone, induction coil or other device apart and separate from the telephonic system employed to record the conversations. The evidence shows only that there was a direct attachment, a forbidden physical penetration of the communications system. The relevant testimony of Bugbee was as follows: (R. 249)

"Q. Mr. Bugbee, in May and June of 1958 did you have a recording device attached to your telephone?

A. Yes, sir."

The facts in *United States* v. *Stephenson,* 121 F. Supp. 274, Appeal dismissed 223 F. 2nd 336 where defendants' motion to suppress evidence was allowed make a cogent precedent for the matter at bar. In Stephenson, a prosecution for perjury, one Parsons telephoned from his office in California to the defendant in Washington and the two engaged in conversation. Parsons had previously caused to be attached to his telephone instrument a mechanical device which would record conversations. The conversation between Parsons and Stephenson was recorded by means of this device. The defendant had no notice that the conversation was being recorded and did not authorize it. Later, a typewritten transcript of the record was provided to the District Attorney.

Substitute the name Bugbee for Parsons, Mersey for Stephenson, San Antonio for California and Boston for Washington in the above paragraph and the relevant facts of the present case on appeal are presented.

Inasmuch as the rationale adopted by this Court in such cases as *Goldman* v. *United States,* 316 U.S. 129

and *Benanti* v. *United States*, 355 U.S. 96, is that the statute protects the integrity of a telephonic system of communication and that physical penetration of the system and evidence flowing therefrom may not be used to secure a federal conviction, it would appear that the recording by Bugbee of the conversations with Mersey constituted "interception" within the meaning of the Act and the subsequent divulgence of the conversations without the consent of Mersey made them inadmissable against the individual defendant and the corporate defendant herein.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CORNELIUS J. SULLIVAN
EDWARD F. MYERS,
Counsel for Petitioners
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Boston, Massachusetts

Appendix A

United States Court of Appeals
For the First Circuit

No. 6652.

GEORGE F. GLACY,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE;

No. 6653.

DANIEL A. BENSON,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE;

No. 6662.

HENRY MERSEY ET AL.,
DEFENDANTS, APPELLANTS,
v.
UNITED STATES OF AMERICA,
APPELLEE;

No. 6666.

PATRICK B. McGINNIS,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Edward O. Proctor for George F. Glacy, appellant.

Claude B. Cross, with whom *John M. Reed* and *Withington, Cross, Park & McCann* were on brief, for Daniel A. Benson, appellant.

Edward F. Myers, with whom *Cornelius J. Sullivan* and *Holtz, Sullivan & Zonderman* were on brief, for Henry Mersey et al., appellants.

William T. Griffin, with whom *Lawrence R. Cohen* and *Newton H. Levee* were on brief, for Patrick B. McGinnis, appellant.

John F. Dougherty, Attorney, Department of Justice, with whom *Donald F. Turner*, Assistant Attorney General, *W. Arthur Garrity, Jr.*, United States Attorney, and *Howard E. Shapiro* and *Richard A. Wegman*, Attorneys, Department of Justice, were on brief, for appellee.

OPINION OF THE COURT.

May 25, 1966.

ALDRICH, *Chief Judge.* The defendants, McGinnis, Glacy, and Benson, president, vice-president in charge of finance and accounting, and vice-president in charge of operations, respectively, of the Boston & Maine Railroad, were convicted of misapplying [1] assets of the railroad. Defendants Mersey and International Railway Equipment Corporation, hereinafter collectively, Mersey,[2] were convicted of aiding and abetting. We will deal with the evidence later at more length. Briefly, the government showed that defendant officers presented to the railroad's board of directors a proposal to sell ten stainless steel passenger cars for $250,000, an unreasonably low price, and obtained approval by false statements of what similar cars were selling for; that they caused the cars to be sold for that price to Mersey, the railroad receiving payment only after Mersey had sold to another road which was already committed to buy for $425,000; that Mersey thereafter paid the defendant officers, individually and respectively, $35,000,

---

[1] "[E]mbezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property, or assets . . . or willfully or knowingly converts the same to his own use or to the use of another . . . ." 18 U.S.C. §660.

[2] Mersey was the principal officer and representative, as well as sole stockholder of International.

$25,000 and $11,500, or a total of $71,500, much of which was actual proceeds of the sale.[3] All defendants moved unsuccessfully for a dismissal of Count 2 of the indictment, the one on which they were convicted,[4] and for directed verdicts of acquittal for joint and, in most instances, individual reasons. The appeals raise certain further issues.

A basic matter, which defendants presented in various manners,[5] is a supposed distinction between misapplying the cars and misapplying the proceeds. We are unimpressed, as was the district court, whose analysis of the issue and exposition to the jury was a model of simplicity and clarity.

The offense charged was the improper sale at a known inadequate price,[6] to a fraudulent middleman,[7] with defendants' intended acquisition and retention of the proceeds, all part of the one grand design. The statute is not restricted to technical embezzlement, but embraces the

---

[3] The fact that the proceeds could be specifically traced becomes relevant in a later matter, but does not enter into our decision that the offense was made out.

[4] Count 1, after having gone to the Supreme Court, *United States v. Boston & Maine R.R.*, 1965, 380 U.S. 157, was dismissed during trial.

[5] The defendants' attacks on the indictment, demands for particulars, motions for acquittal and a number of their refused requests for instructions, directly or indirectly raised this issue.

[6] It is this aspect of the case that distinguishes it from the state decisions cited by the defendants. We agree that the agents there entrusted to sell property, whether potatoes, watermelons, bonds, stock, automobiles, or spreaders, could not be convicted of conversion of the proceeds on a charge of converting the property. In those cases the sales were fully authorized. In the case at bar if defendants' only misconduct had been to intercept and pocket proceeds of an honest sale, the present indictment would have been inappropriate. But that is not this case. The defendants were charged with a larger offense. The district court's instruction laid this issue on the line.

> "If what these defendants did was bad judgment in selling the cars at the price for which they sold them, or was stupidity and nothing more, then they are not responsible. They have a wide degree of latitude in the exercise of their judgment. But will-

broader concept of misapplication. *Cf. Batchelor* v. *United States,* 1895, 156 U.S. 426; *United States* v. *Mulloney,* D. Mass., 1934, 8 F. Supp. 674, *aff'd,* 79 F.2d 566, *cert. den.* 296 U.S. 658; *Kramer* v. *United States,* 4 Cir., 1951, 190 F.2d 712, 717-18. The defendant officers committed one underlying offense, violative of the statute, whether their action is sought to be broken down as depriving the railroad of the cars for less than they were worth, to their individual advantage, or as pocketing proceeds which, in law, belonged to the railroad.[8]

The indictment fully sets out the statutory offense and the basic facts charged, so that neither the grand jury nor the defendants were misled. Count 2 of the indictment charges one offense, and the evidence abundantly supports it, unless there was some error as to its admission.

The defendants duly objected to the court's instruction to the jury, near the end of the government's case, that it was warranted in considering all the evidence against all the defendants. This raises the question whether sufficient concert among them was independently shown. *Lee Dip* v. *United States,* 9 Cir., 1937, 92 F.2d 802, *cert. den.* 303

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fulness means that they intended to do what they did, and did it voluntarily, and with a specific intent, or bad purpose, the bad purpose being to line their own pockets at the expense of the Boston and Maine."

The statement, made in oral argument by one of the defendants, that the "court put to the jury that the only question was whether the defendants converted the money," if the charge is taken as a whole is simply not so.

[7] Mersey, because he took title, objects to being described as a middleman. It is clear on the government's evidence, however, that the cars passed through him as part of the original scheme, in order to siphon off what rightly should have gone to the railroad.

[8] For this latter reason cases such as *Heath* v. *United States,* 9 Cir., 1954, 209 F.2d 318, and *Golden* v. *United States,* 1 Cir., 1963, 318 F.2d 357, are inapposite. In *Heath* it conclusively appeared that the property had ceased to be government property before it was converted. In *Golden* the question was whether the property misapplied by the defendant had been delivered to him in his capacity as officer of the bank, or as a fiduciary for another.

U.S. 638; *United States* v. *Olweiss*, 2 Cir., 1943, 138 F.2d 798, *cert. den.* 321 U.S. 744.

Evidence introduced by the government and independently admissible, disclosed the following. In 1957, prior to the sale of the ten passenger cars, the railroad had sold two stainless steel dining cars to Bugbee, a Texas dealer in used railway equipment. Throughout this prior transaction the railroad acted through its employee, Bolton, who was the one regularly in charge of such matters. Bugbee resold the cars to the Wabash Railroad. All of these facts were known to all of the officer defendants. On April 30, 1958 [9] Bugbee saw Bolton in Boston and indicated an interest in the passenger cars. Bolton replied that they were in use and not for sale. However, on request, he took Bugbee to Glacy. Bugbee inquired if he could have an option to purchase the cars for $500,000. Glacy refused. On April 29 Glacy had received from Benson, the defendant officer in charge of such matters, a current list of equipment available for sale. These cars were not on it. We now recite, under each defendant's name, evidence admissible at least against the stated defendant.

Mersey

Mersey's files contained a copy of Benson's "for-sale" list, dated, in Mersey's handwriting, April 30. On it was written in Mersey's handwriting, "add ten stainless cars," with a notation that Mersey was requesting prints. On May 10, after calling several times previously, Mersey reached Bugbee on the telephone, introduced himself, said he "owned" the ten cars, and offered to split with Bugbee whatever the latter could realize above $500,000. On June 25 Mersey telephoned Bugbee and reported that McGinnis had complained to Mersey that Wabash had tried to deal

[9] Unless otherwise noted, all dates refer to 1958.

directly with McGinnis. Mersey stated that he had the situation in hand, and that he had told McGinnis so. Bugbee reported, in the same conversation, that Wabash would not pay more than $500,000. On July 17 Bugbee informed Mersey that Wabash's top price was $425,000.

The sale was voted on July 23, and consummated August 14. Between August 13 and December 16, Mersey made payments to the defendant officers totalling $71,500.

Glacy

Glacy, in early June, informed Bolton that the sale of the ten cars would not be handled by Bolton, but by Mersey. Bolton objected that it was his job, and raised Bugbee's prior interest. Glacy told Bolton that McGinnis wanted it handled this way. On June 26, the day after Bugbee had told Mersey that Wabash's top price was $500,000, Glacy stated in an office memorandum seeking Benson's pricing of the cars, that similar cars had been bought from the New York Central by Seaboard Airline for $20,000 to $22,000 after it had been "practically ready to buy these coaches from us." In fact Seaboard had not been practically ready, had bought nothing from New York Central, and had bought cars, the nature of which did not appear, from the C & O for $84,000. On July 18, the day after Bugbee had told Mersey that Wabash's top figure was $425,000, Glacy informed Benson by office memorandum that he had an offer of $250,000, and requested Benson's approval. When the sale was consummated Glacy, upon releasing the cars, accepted a personal check post-dated by eight days. It was customary to require a certified check. The personal check exposed the railroad to serious risk. Mersey was already indebted to the railroad in the amount of $75,000 for a longer time than it was customary to permit, and had a bank balance of only $30,000.

Glacy received and collected payments on two checks, $12,500 each, drawn by Mersey on August 22 and 29.

Benson

Benson took Mersey to Bangor on April 30, the railroad paying the air fare. Since no railroad reason for Mersey's trip has been suggested, this indicates, at the least, some intimacy between Benson and Mersey. Benson's retained office copy of his "for-sale" list had a note attached stating that prints of the ten cars had been given Mersey on May 1. Benson, whose duties related to the sale and purchase of equipment, and who could be expected to be knowledgable, in giving Glacy a price of $30,000 on June 30, accepted Glacy's gross misstatement of the New York Central price. When Glacy, by subsequent memorandum, asked approval of $25,000 a car, Benson replied affirmatively, stating the cars were going to require heavy overhaul, at a cost of $25,000 apiece.

Benson received and collected payment on three checks drawn by Mersey on August 13, October 9, and December 16, for $5,000, $1,500, and $5,000, respectively.

McGinnis

It was McGinnis' custom, as president, to review the agenda for the directors meeting beforehand. The memorandum presented to the July 23 meeting requesting a vote on the sale of the ten cars did not name the buyer. Nor did it name the railroad officials who were endorsing the sale, but merely stated that it was recommended by "management." These lacunae were both contrary to standard practice. The sale was unanimously voted. In January 1962, McGinnis told an ICC investigator that he had been the one to present the sale to the directors. On the stand he denied this. Glacy and Benson were not directors, and if McGinnis had not sponsored the sale it does not appear who did.

McGinnis received and collected payment on three checks drawn by Mersey—two on October 10, each for $10,000, and one on December 3, for $15,000.

Each officer defendant took the stand and admitted, and sought to explain, receipt of the payments charged to him. Benson testified that his payments were for information and advice allegedly given Mersey in connection with other property Mersey had considered buying from the railroad. In making this explanation Benson, at the least, implicated himself as sufficiently intimate with Mersey to sell him information in clear breach of his fiduciary obligations to his employer.

Glacy testified that his two checks represented two years' salary for consulting services rendered to Mersey. The checks, ostensibly a week apart, were actually contiguous in the checkbook. On Glacy's testimony they represented a payment of the first year's salary nearly eight months later, and of the second year's salary four months prior to the end of the year. Furthermore, Glacy had previously received from Mersey appropriate compensation for the first year's salary, assuming it was earned at all. As against Glacy's testimony, in January 1962 he had told an ICC inspector that he had never received payments of any description from Mersey or his company.

McGinnis testified that his payments from Mersey had been for services in connection with a transaction referred to as the Schiavone loan. The loan never went through. In January 1962 McGinnis told an ICC inspector that he had never received any payments from Mersey or his company, and specifically, that he had not received $35,000, and that although he had worked on the Schiavone loan, it had not materialized and he had received no fee. There were additional inconsistencies of record in McGinnis' courtroom explanations.

Mersey did not take the stand. His company records showed the various payments, but inconsistently with some of the defendant officers' testimony.

In sum, it could properly be found that each of the defendant officers consciously acted to facilitate the improper sale of the cars. Among other things, Glacy grossly misstated the circumstances of supposedly similar cars being bought by the Seaboard Airline; Benson, within whose expertise such matters lay, acquiesced in his statement, and in the price at which the Boston & Maine cars were ultimately sold; and McGinnis presented the matter of the sale to the board of directors in a significantly unorthodox manner. Even if there were merit in the defendant officers' contention that there was no direct evidence that any of them conspired with each other, a contention which leaves a number of matters unanswered, there was clear evidence that each conspired with Mersey. It was far too much of a coincidence, when events interlocked in the manner set forth, for the district court not to have been able to find that there was one conspiracy embracing all the defendants, rather than three isolated bilateral agreements. The court's ruling was amply supported.

Only one further matter merits mention. Some of the testimony damaging to the defendants came from Bugbee, whose accounts of his telephone conversations with Mersey were reinforced by introduction of transcripts of recordings made by Bugbee without the knowledge, and hence consent, of Mersey. Defendants say that the transcripts are rendered inadmissible because their divulgence would violate 47 U.S.C. § 605, the arguably pertinent portion of which reads,

> "[N]o person not being authorized by the sender shall intercept any communication and divulge or publish

> the existence, contents, substance, purport, effect, or meaning of such intercepted communications to any person . . . ."

We agree with the reasoning of the court in *Carnes* v. *United States*, 5 Cir., 1961, 295 F.2d 598, *cert. den.* 369 U.S. 861, holding the transcripts admissible. This result accords not only with the decision of the court in *Rathbun* v. *United States*, 1957, 355 U.S. 107, but, we believe, with the minority opinion as well.

Affirmed.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6662.

HENRY MERSEY ET AL.,
Defendants, Appellants,
v.
UNITED STATES OF AMERICA,
Appellee.

JUDGMENT
May 25, 1966

This cause came on to be heard on consolidated appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgments of the District Court are affirmed.

By the Court:
(s) ROGER A. STINCHFIELD
ROGER A. STINCHFIELD
Clerk.

[cc: Messrs. Myers and Shapiro.]

Appendix C

United States Court of Appeals
For the First Circuit

No. 6662.

HENRY MERSEY ET AL.,
DEFENDANTS, APPELLANTS,

v.

UNITED STATES OF AMERICA,
APPELLEE.

PETITION FOR REHEARING

Now come the defendants, appellants Henry Mersey and International Railway Equipment Corporation and petition the Honorable Court for a rehearing of the above-captioned case, predicated on the judgment and opinion of this Court entered on May 25, 1966. In support of this Petition, the defendants, appellants Mersey and International assign the following grounds:

1. In its opinion the Court stated at page 3 that it was unimpressed with the "supposed distinction between misapplying the cars and misapplying the proceeds". The Court went on to say that "the offense charged was the improper sale, at a known inadequate price, to a fraudulent middleman, with defendants' intended acquisition and retention of the proceeds, all part of the one grand design".

It would appear that this Court has sustained the conviction of the defendants, appellants Mersey and Interna-

tional for aiding and abetting in the misapplication of ten railway cars of the Boston & Maine Railroad when in fact the alleged offense submitted to the jury for their consideration was the misapplication of $71,500, allegedly part of the proceeds from the resale of the same ten railway cars by International to a subsidiary of the Wabash Railroad.

The government in its opening to the jury (R. 43) specifically elected to proceed with the case of the theory that the "$71,500 . . . rightfully and legally belonged to the Boston & Maine Railroad". Later on, the trial court instructed the jury (R. 700) that on all the evidence title to the ten cars passed from Boston & Maine to International and then from International to the Wabash subsidiary. The trial court further charged that the money paid by the Wabash subsidiary "became the monies of International Railway Equipment Corporation".

In view of the constitutional requirement that defendants be adequately apprised of the offense with which they are charged and especially in view of the case of *Russell* v. *U.S.*, 369 U.S. 749 (1962) it would appear that justice may require a further consideration of this issue.

2. At page 9 of its opinion, the Court stated that "it could possibly be found that each of the defendant officers consciously acted to facilitate the improper sale of the cars". Neither defendant Mersey nor International were officers of the common carrier whose cars were allegedly misapplied. These two defendants were charged only with aiding and abetting the three principal defendants. It would indeed be impossible for Mersey and International to be convicted of the substantive offense outlined in Section 660 unless they were officers of a common carrier. They have instead been charged with aiding and abetting the other defendants. In order to convict Mersey and International it was necessary to raise them from the level of aiders and

abettors to that of co-conspirators. In the absence of a count charging the substantive crime of conspiracy it is possible to convict on a joint venture theory for the commission of a substantive offense (*U.S.* v. *Olweiss*, 138 F.2d 798, cert. denied, 321 U.S. 744), but the question remains open as to whether an aider and abettor, two steps removed from the substantive offense, can be convicted under the same theory.

3. On page 4 of its opinion, the Court said that "the proceeds . . . in law belonged to the railroad", and in a foot note on the same page, "it is clear . . . that the cars passed through him (Mersey) as part of the original scheme in order to siphon off what rightly should have gone to the railroad . .", the above referring to the total of $71,500 which was paid over by International to the three principal defendants. Yet the record is barren of any evidence offered by the government to prove that McGinnis, Glacy and Benson received their payments in their capacity as corporate officers of the Boston & Maine or otherwise. While the jury was free to believe or disbelieve the testimony of the three officers, it was not free to make a finding of fact that the contrary of the statements given in testimony by the three corporate officers was true in the absence of even a scintilla of affirmative evidence offered by the Government. Under the reasoning of *Golden* v. *United States*, 318 F.2d 357, it would appear that the capacity in which the three officers received the payments would have to be supported by evidence, beyond the fact of the payments themselves.

4. In its opinion at page 9, the Court adopted the reasoning of *Carnes* v. *United States*, 5 Cir., 1961, 295 F.2d, 598, cert. den. 369 U.S. 861 with respect to the admissibility of transcripts of telephone conversations between Mersey and Bugbee, holding that the transcripts were not rendered inadmissible as a violation of 47 U.S.C. 605. We would respectfully submit that the facts in *Carnes* are

different enough to warrant rehearing on this issue since in Carnes there did not appear to be the extent of physical penetration of the means of communication required under the decisions of *Goldman* v. *United States,* 316 U.S. 129, 133 and *Benanti* v. *United States,* 355 U.S. 96, 100.

For all of the above reasons we submit that this Court should grant a rehearing on this case.

Respectfully submitted,

CORNELIUS J. SULLIVAN

EDWARD F. MYERS
19 Milk Street
Boston, Mass. 02109
Attorneys for the Defendants, Appellants

CERTIFICATE

We, Cornelius J. Sullivan and Edward F. Myers, counsel for the defendants, appellants Henry Mersey and International Railway Equipment Corporation, certify that the foregoing Petition for Rehearing is presented in good faith and not for purposes of delay.

CORNELIUS J. SULLIVAN

EDWARD F. MYERS

Appendix D

TITLE 18, UNITED STATES CODE SECTION 2

2. Principals

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

TITLE 18, UNITED STATES CODE SECTION 660

660. Carrier's Funds Derived From Commerce; State Prosecutions

Whoever, being a president, director, officer, or manager of any firm, association, or corporation engaged in commerce as a common carrier, or whoever, being an employee of such common carrier riding in or upon any railroad car, motor truck, steamboat, vessel, aircraft or other vehicle of such carrier moving in interstate commerce, embezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property, or assets of such firm, association, or corporation arising or accruing from, or used in, such commerce, in whole or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred but also in any district in which the defendant may have taken

or had possession of such moneys, funds, credits, securities, property, or assets.

A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution hereunder for the same act or acts. June 25, 1948, c. 645, 62 Stat. 730.

TITLE 47, UNITED STATES CODE SECTION 605

605. Unauthorized Publication Or Use Of Communications

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance,

purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. June 19, 1934, c. 652, Title VI 605, 48 Stat. 1103.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 284

DANIEL A. BENSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 285

GEORGE F. GLACY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 287

PATRICK B. MCGINNIS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 288

HENRY MERSEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

On Petitions for Writs of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. No. 284, pp. 22-31) is reported at 361 F. 2d 31.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 1966 (Pet. No. 284, p. 33). Petitions for rehearing filed by petitioners McGinnis, Mersey and International were denied on June 10, 1966 (Pet. No. 287, p. 19a; Pet. No. 288, pp. 2, 12a-15a). The petitions for certiorari were filed in Nos. 284 and 285 on June 23, 1966, and in Nos. 287 and 288 on June 24, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the petitioners' acts constituted willful misapplication of funds or property of a common carrier, in violation of 18 U.S.C. 660.

2. Whether the indictment adequately set forth the facts constituting the offense charged.

3. Whether the trial court correctly ruled that, in the circumstances of this case, the acts and statements of each defendant were admissible against all of them.

4. Whether the trial court properly admitted transcripts of telephone conversations that were recorded by one of the parties to the conversations.

STATUTES AND RULE INVOLVED

18 U.S.C. 660 provides in pertinent part:

> Whoever, being a president, director, officer, or manager of any firm, association, or corporation

> engaged in commerce as a common carrier * * * embezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property, or assets of such firm, association, or corporation arising or accruing from, or used in, such commerce, in whole or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be fined not more than $5000 or imprisoned not more than ten years, or both.
>
> * * * *

18 U.S.C. 2 provides in pertinent part:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> * * * *

47 U.S.C. 605 provides in pertinent part:

> * * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * *.

Rule 7(c) of the Federal Rules of Criminal Procedure provides in pertinent part:

> The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. * * *

STATEMENT

After a jury trial, petitioners Benson, Glacy and McGinnis were convicted of violating 18 U.S.C. 660

by willfully misapplying and converting property of the Boston and Maine Railroad ("B&M"), and petitioners Mersey and International Railway Equipment Corporation ("International") were convicted of the same offense as aiders and abettors under 18 U.S.C. 2.[1] McGinnis was the president, and Benson and Glacy were vice-presidents, of the B&M; Mersey was the president and sole stockholder of International, the corporate conduit through which the misapplication was accomplished. The misapplication involved the sale by the B&M of 10 railroad cars to Mersey for the unreasonably low price of $250,000; the immediate resale of the cars by Mersey for $425,000 to another carrier which already had indicated its willingness to pay that amount for them; and the payment by Mersey of $71,500 to McGinnis, Benson and Glacy. Each individual petitioner was sentenced to 18 months imprisonment; McGinnis, Benson and Glacy were each fined $5,000; and Mersey and International were each fined $2500 (R. 746-750, 752). The court of appeals unanimously affirmed (Pet. No. 284, pp. 22-31).

The facts, viewed most favorably to the government, are as follows:

In 1947 the B&M had purchased 10 stainless steel cars at approximately $85,000 each (R. 294). On April 30, 1958 Bugbee, a dealer in used railroad equip-

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[1] Another count of the indictment charged petitioners McGinnis, Benson and Glacy with violating Section 10 of the Clayton Act, 15 U.S.C. 20. The district court dismissed that count as not stating an offense, but this Court reversed. *United States* v. *Boston & Maine Railroad Co.*, 380 U.S. 157. During the trial the government dismissed that count (R. 109).

ment, visited Bolton, the railroad's director of purchases and stores, and expressed an interest in purchasing the cars (R. 94, 186).[2] When Bolton told him that the cars were not for sale because still in service, Bugbee insisted on seeing someone in higher authority. Bolton took Bugbee to Bolton's superior, Vice President Glacy, who refused to give Bugbee an option to purchase the cars at $50,000 each, on the grounds that they were still in service and that the railroad carried them on its books at $80,000—$90,000 (R. 94-95, 186-188).

On the day before Bugbee's visit, Vice President Benson (whose duties included determining what B&M cars were no longer needed, R. 118, 426, 555-556, 565, 567), had written Glacy a memorandum listing equipment available for retirement and sale, which did not include the 10 cars (GX 43, R. 803). Following Bugbee's visit, however, Benson requested the specifications on the 10 cars, and on the day after the visit the specifications were sent, apparently at Benson's direction, to Mersey (R. 174, 189-190, 531-535, 560, 593; GX 21, R. 773; GX 70, R. 816). Mersey also received Benson's personal copy of the memorandum, on which Mersey had written: "Add: (10-stainless steel coaches) (Not on list)" (R. 57-58, 98, 561-562; GX 21, R. 773). Ten days later Mersey called Bugbee (who did not know him) on the telephone, told Bugbee that he had the cars for sale, and offered to

[2] In the preceding year Bugbee had purchased from the B&M two dining cars that the railroad had acquired at the same time as the 10 cars. Bolton had handled that transaction "from beginning to end" (R. 89-94).

divide any resale profits in excess of $50,000 per car (R. 191). Bugbee then offered the cars to the Wabash Railroad ("Wabash") for $55,000 to $60,000 each (R. 193).[3]

In early June, Glacy told Bolton that a decision had been made to sell the 10 cars, that the sale would be handled exclusively by Mersey, and that Bolton was to do nothing further about it (R. 99-101). When Bolton asked why he would not handle the sale—that being his usual job—Glacy replied: "Mr. McGinnis wanted it handled in that manner" (R. 85-91, 99).

Late in June Bugbee told Mersey that the Wabash was "set on" a price of $50,000 per car (GX 80, R. 825).[4] A few days later Benson authorized Glacy to sell the cars for $30,000 each (GX 40, R. 797; GX 41, R. 799). On July 17, however, the Wabash persuaded Mersey to reduce the price to $42,500 (R. 195). The following day Glacy advised Benson that he had a firm offer at $250,000 (GX 39, R. 797) and Benson authorized the sale at that price (GX 38, R. 796).

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[3] Bugbee previously had resold to the Wabash Railroad the two dining cars he purchased from the B&M in 1957 (see note 2, *supra*), and McGinnis and Glacy knew that he had done so (R. 89-94; GX 58, R. 806).

[4] In the same telephone conversation Mersey related the substance of a conversation that he had had with McGinnis the preceding week. According to Mersey, McGinnis had expected him to handle the entire transaction, and was concerned because President Atkinson of the Wabash had been dealing directly with McGinnis. When Mersey assured McGinnis that he had the situation in hand, McGinnis replied, "Why in the hell would Atkinson want to come to me, then, if you are handling it?" (GX 80, R. 825).

On July 22, Glacy prepared a memorandum for the board of directors which stated that "Mr. Benson and I recommend that we accept the offer of $250,000," and that the Seaboard Air Line Railroad had been "practically ready" to buy the B&M cars, but instead had purchased similar equipment from the New York Central Railroad for $20,000—$22,000 per car (GX 42, R. 801-802). Seaboard had not been "practically ready" to buy the cars (R. 281), and the price it actually paid for similar equipment was $84,000 per car (R. 280-281, 287).

Glacy's memorandum was submitted through Benson's department to the clerk of the railroad for inclusion on the agenda of the board of directors' meeting scheduled for the next day (R. 314, 317-318, 323, 328; GX 42, R. 801-802). The normal practice was for the clerk to submit the agenda to the president to determine if any changes were necessary, and then to send it out a week in advance to the other directors for review (R. 314, 326). This was not done for the 10-car proposal, which was submitted to McGinnis by the clerk the day before the meeting (R. 323; GX 42, R. 801-802; GX 88, R. 841). As originally submitted to the clerk, the memorandum stated: "Mr. Benson and I recommend * * *" (R. 323; GX 42, R. 801-802). Prior to the meeting, however, it was revised to read "Management recommends * * *" (R. 325-326; GX 89, Schedule D, xeroxed), and McGinnis, upon seeing the revised memorandum, told the clerk that it was "satisfactory" (R. 326). On July 23 McGinnis presented the proposal to the board (R. 647), which unanimously approved it without discussion (R. 323;

GX 24, R. 778).[5] On the same day, Mersey gave Bugbee an option, valid until August 1, to purchase the cars for $450,000 (GX 79, R. 822-823). On August 1 a Wabash subsidiary agreed to purchase the cars from International for $425,000 (GX 33, R. 784-785).

Glacy executed a bill of sale for the 10 cars to International on August 14, 1958 (GX 24, R. 777). The next day, International reconveyed the cars to the Wabash subsidiary for $425,000 (GX 83, R. 833-834). International's check to the B&M for $250,000 was post-dated to August 22, 1958 (GX 22, R. 774). Although the B&M normally would require a certified check for that amount, Internation's check was not certified (R. 303; GX 22, R. 774).

During the four-month period (August 13-December 16) following the sale, McGinnis received $35,000, Benson $11,500 and Glacy $25,000—a total of $71,500—from International, in checks signed by Mersey (GX 1-A - 3C, R. 761-768).[5a]

At the trial, McGinnis, Benson and Glacy claimed that the payments were received in connection with

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[5] On the same agenda for the July 23 meeting were 28 other proposals for the sale of B&M real estate. In each of those other proposals, the recommendation actually presented to the board of directors at the meeting showed the names of both the purchaser and the B&M staff sponsor (GX 89 Scheds. A-1 through A-28).

[5a] As of August 14, International's bank balance was approximately $30,000, and it owed the B&M $75,500 (R. 308-309, 338; GX 87, R. 839). Between that date and December 16 its receipts, other than the proceeds from the sale of the cars and from the sale of parts for the cars, totalled $12,300 (R. 339; GX 91, Ex. I, R. 875-876; GX 34, sheets U-2602, CR-10 (xeroxed)).

other business transactions they had with International (R. 361, 378-381, 433, 577). McGinnis contended that he was paid $35,000 for arranging a prospective loan—one that never was made (R. 382-386, 399-400). He and Benson each admitted that the alleged services for International would have involved a conflict of interest between themselves and the B&M (R. 404, 611-614; Pet. No. 284, p. 10). The stubs for Benson's and McGinnis' checks from Internationel were marked "loans" (R. 568; DX R, R. 953; DX AA, R. 981). In their tax returns, McGinnis identified the payments as "director's fees" (not consulting fees, as he contended at trial, R. 385-387), and Glacy reported that he had received only $22,000, although his two checks during 1958 totalled $25,000 (R. 418, 458; DX S, R. 960). In 1962 interviews with an agent of the Interstate Commerce Commission, both McGinnis and Glacy denied having received any money from International during 1958 (R. 647, 651-652).

ARGUMENT

1. The court of appeals correctly held that petitioners' conduct violated 18 U.S.C. 660. That section makes it a crime for any officer of a common carrier willfully to misapply, or willfully to convert to his own or another's use, "any of the moneys * * * property, or assets of" the carrier. The evidence (see the Statement, *supra*) fully justified the jury in concluding that McGinnis, Benson and Glacy, the three top officers of the B&M, sold property of the carrier to Mersey for $250,000 (an unreasonably low price), on the understanding that he would resell it for $425,000 to another carrier already committed to

buying it at that price, and that he would remit to them a substantial portion of his profit. McGinnis, Benson and Glacy clearly violated their fiduciary obligation to the corporation and the latter could have compelled them to account for their derelictions. *Blum* v. *Fleishhacker*, 21 F. Supp. 527, 530-531 (N.D. Calif.), affirmed in part, reversed in part, 109 F. 2d 543 (C.A. 9), certiorari denied, 311 U.S. 665; 3 Fletcher, *Cyclopedia of Private Corporations*, § 884, at 284. By retaining $71,500 of the profits on the transaction—profits which belonged to the corporation and not to them—McGinnis, Benson and Glacy misapplied and converted to their own use property of the B&M, in violation of 18 U.S.C. 660.

Petitioners contend, however, that since the B&M parted with its title to the cars by selling them to International for $250,000, the $71,500 that McGinnis, Benson and Glacy received from Mersey out of his profits on the resale of the cars did not constitute property "of" the B&M. The applicability of the statutory prohibitions, however, does not turn upon such technical niceties of title. As noted, the B&M could have recovered the $71,500 from McGinnis, Benson and Glacy, and this gave it a sufficient property interest in the money to bring petitioners' conversion thereof within the statute.

Under 18 U.S.C. 656, which prohibits similar misapplications of corporate property by officers of national banks, it is well settled that the bank need not have title to the misapplied property for the officer to violate that statute by misapplication; it suffices that the bank's interest in or claim to the property is superior to the officer's. *Spencer* v. *United States*,

169 Fed. 562, 566-567 (C.A. 8); *United States* v. *Harter*, 116 F. 2d 51, 54-55 (C.A. 7); *Kramer* v. *United States*, 190 F. 2d 712, 717-718 (C.A. 4). Section 660 was modeled on Section 656 [6] and is intended to serve the same fundamental purpose of punishing misapplications of corporate property by corporate officers; there is accordingly no reason to give the former statute any narrower reach than the latter. If the B&M had sold the cars for $71,500 more than it did, and Mersey had paid that amount directly to McGinnis, Benson and Glacy, there could be no doubt that the latter would have misapplied or converted property "of" the B&M. The result should be no different merely because they sold the cars for the lower amount and thus avoided the appearance of directly converting the carrier's property, when in fact they committed the same breach of fiduciary obligation and made the same profit.

2. The court of appeals correctly ruled (Pet. No. 284, p. 26) that the indictment adequately set forth the facts constituting the offense with which petitioners were charged.

Paragraph 11 of the indictment charged that McGinnis, Benson and Glacy, by "carrying out a transaction pursuant to which * * * [10] coaches were sold to International for $250,000, willfully misappl[ied] * * * moneys * * * property and assets of the said

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[6] Section 660 was originally enacted as Section 9 of the Clayton Act, 38 Stat. 730 (1914). Senator Chilton, one of the sponsors of the legislation, explained that "This proposed statute was drawn practically from the banking statute as to embezzlement and willfully misapplying funds of the institution." 51 Cong. Rec. 14032. See, also, *id.*, at 14032-14035.

B&M * * *; and did willfully convert to their own use * * * [such] moneys * * * properties and assets * * * to wit, $71,500" (R. 18-19). Paragraph 12 and 13 described "the manner" in which they "effectuated" the "aforesaid violations" (R. 19). It summarized the facts set forth in the Statement, *supra*, and gave the details of the $71,500 payments that Mersey made to them (R. 19-20). Paragraph 13 concluded that the $71,500 "were derived almost entirely out of the proceeds from the resale by International of the said 10 coaches", and that "[u]pon the delivery of the aforesaid sums to defendants McGinnis, Glacy and Benson, the said defendants withheld the said moneys from the B&M, and retained them exclusively for their own account and use" (R. 20).

The indictment fully satisfied the requirement of Rule 7(c) of the Federal Rules of Criminal Procedure that it be "a plain, concise and definite written statement of the essential facts constituting the offense charged." It adequately informed petitioners that they were charged with conversion of the $71,500 rather than, as they suggest (Pet. No. 284, pp. 18; Pet. No. 285, pp. 4-5; Pet. No. 287, pp. 11-12), with conversion of the cars themselves. Thus, the indictment alleged that McGinnis, Benson and Glacy had misapplied property of the B&M through willfully converting to their own use the $71,500 they received from International, and that upon receipt of those sums they had "withheld the said moneys from the B&M, and retained them exclusively for their own account and use" (R. 20). That petitioners were adequately informed of the charge against them is further shown by the fact that at the trial McGinnis,

Benson and Glacy each took the stand and attempted to justify the payments received from International on the ground that they related to other transactions with that company. See *supra*, pp. 8-9.[7]

3. At the beginning of the trial, the court told the jury (R. 50-51) that in dealing with the admissibility of evidence against more than one defendant, it was "adopt[ing] a procedure here which will probably shorten the trial and avoid the necessity of attorneys constantly protecting their rights and properly protecting their rights." The procedure was that the government could offer evidence either against a particular defendant or generally; that if evidence was offered generally the court would rule against whom

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[7] There is nothing in *Russell* v. *United States*, 369 U.S. 749, upon which petitioners Benson and Glacy rely (Pet. No. 284, pp. 18-21; Pet. No. 285, pp. 4-5), which warrants invalidating the indictment. *Russell* involved a prosecution for contempt of Congress under 2 U.S.C. 192, growing out of a witness' failure to answer questions before a Congressional Committee. The statute penalizes a refusal to answer "any question pertinent to the question under inquiry." The Court held that since "the very core of criminality under 2 U.S.C. § 192 is pertinency to the subject under inquiry of the questions which the defendant refused to answer" (p. 764), the mere allegation of pertinency in the general words of the statute was insufficient "to sufficiently apprise the defendant 'of what he must be prepared to meet'" (*ibid.*); and that the indictment "must identify the subject which was under inquiry at the time of the defendant's * * * refusal to answer" (p. 754). In the present case, however, as shown in the text, the indictment did "sufficiently apprise the defendant 'of what he must be prepared to meet,'" and the defendants demonstrated by their defense that they were fully aware of what the charge against them was.

it was admissible; and that evidence offered against one defendant "may later on be tied up in some way that the government can offer it against one or more defendants" (*ibid*).

In accordance with this ruling, the government offered its evidence only against particular defendants, but at the conclusion of its case moved that "all evidence which has been received against any defendant * * * be received against all defendants on the ground that there has been ample showing of common plan or design" (R. 349). The court granted the motion (R. 350-351), and instructed the jury that "you may consider as some evidence—admissible evidence, according to my ruling—the acts or statements of one defendant to be used as against all the defendants" (R. 359). The court of appeals, after reviewing the evidence in detail (Pet. No. 284, pp. 26-30), held that "sufficient concert among [the defendants] was independently shown" (*id.* p. 26) to permit the jury to consider all the evidence against all the defendants.

That ruling, which turned upon the facts of this particular case, was correct, and there is no occasion for further review. As the court of appeals held, the evidence concededly admissible against each defendant individually also justified the inferences that the defendants had acted pursuant to a common plan and that, in furtherance of that plan, they had committed the acts and made the statements that the government proved. That was a sufficient showing to justify admitting the evidence against all of them. *United States* v. *Olweiss*, 138 F. 2d 198, 800 (C.A. 2), motion for leave to file a petition for writ of certiorari nunc pro tunc denied, 321 U.S. 744; *Williams* v. *United States*,

289 F. 2d 598, 601-602 (C.A. 9). Moreover, since such a common plan was shown the evidence was admissible against all the defendants even though there was no formal charge of conspiracy against them. *Lee Dip* v. *United States*, 92 F. 2d 802, 803 (C.A. 9), certiorari denied, 303 U.S. 638.

The record similarly refutes the contention (Pet. No. 284, p. 14-15; Pet. No. 288, p. 4) that, under the rule of *Kotteakos* v. *United States*, 328 U.S. 750, the government proved at most only that McGinnis, Benson and Glacy each engaged in a separate conspiracy with Mersey, but did not prove a single conspiracy among all of them. The Statement, *supra*, describes the closely interrelated roles the four individual defendants played in misapplying B&M property for their own personal advantage. In brief, Benson and Glacy made the misapplication possible by arranging for Mersey to handle the sale rather than Bolton, whose normal function was disposing of surplus property; they prepared the memorandum for the board of directors containing misstatements which made the sale at the low price of $250,000 appear advantageous to the B&M. McGinnis persuaded the directors to approve the sale on the basis of the misleading memorandum which had been changed to eliminate the disclosure that Benson and Glacy were the sponsors of the proposal. Glacy departed from the railroad's usual practice of requiring a certified check for a large transaction, and accepted a non-certified one that was post-dated eight days. Finally, after International had sold the cars at a substantial profit, McGinnis, Benson and Glacy each received a substantial

portion of that profit in checks of International signed by Mersey. As the court of appeals correctly concluded (Pet. No. 284, pp. 30-31):

> It was far too much of a coincidence, when events interlocked in the manner set forth, for the district court not to have been able to find that there was one conspiracy embracing all the defendants, rather than three isolated bilateral agreements.

4. Bugbee, one of the government's witnesses, customarily made recordings on disks of his business telephone conversations relating to prices, quotations, and sales and negotiations on equipment (R. 251). His secretary then transcribed the disks, which were thrown away, and he kept the transcripts in his office as part of his records (R. 252). He made such transcripts of two telephone conversations he had with Mersey in May and June 1958 (see pp. 5, 6 *supra*). On direct examination he testified about these conversations (R. 190-193, 198-204). On cross-examination defense counsel used the transcripts in an attempt to impeach him (R. 207-208). On re-direct examination the government offered the transcripts in evidence, and the court admitted them as records kept in the regular course of business (R. 252-253).

Petitioner Mersey contends (Pet. No. 288, pp. 6-9) that Section 605 of the Federal Communications Act (47 U.S.C. 605) barred the admission of the transcripts. That section prohibits the unauthorized interception, divulgence or publication of any telephone communication. In *Rathbun* v. *United States*, 355 U.S. 107, this Court held that the district court properly had admitted in a criminal trial testimony as to

what a police officer overheard while listening to a conversation on an ordinary telephone extension in another room, with the consent of one party to the conversation. The Court stated (p. 111, emphasis in original):

> * * *Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place there has been no violation of any privacy of which the parties may complain. Consequently, one element of Section 605, *interception*, has not occurred.

In the present case the recording of the conversation by Bugbee and its subsequent transcription by his secretary similarly did not constitute an "interception" of the communication within the meaning of Section 605. *Rathbun* makes it clear that there would have been no violation if, instead of using a recording device, Bugbee had had his secretary listen to the conversation. The fact that Bugbee made a recording which his secretary transcribed does not warrant a different result. Cf. *Lopez* v. *United States*, 373 U.S. 427. Indeed, in *Rathbun* the Court stated (355 U.S. at 110):

> It has been conceded by those who believe the conduct here violates Section 605 that either party may record the conversation and publish it.

Where, as here, a recording is made by attaching a device to the telephone by or with the consent of one of the parties to the conversation, Section 605 has not been violated. *United States* v. *Yee Ping Jong*, 26 F.

Supp. 69, 70 (W.D. Pa.); *Carnes* v. *United States*, 295 F. 2d 598, 602 (C.A. 5), certiorari denied, 369 U.S. 861; *Wilson* v. *United States*, 316 F. 2d 212, 213 (C.A. 9). The contrary district court decision in *United States* v. *Stephenson*, 121 F. Supp. 274 (D.D.C.), appeal dismissed, 223 F. 2d 336 (C.A. D.C.), upon which petitioner Mersey relies (Pet. No. 288, p. 8), was in effect nullified by *Rathbun*.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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AUGUST 1966.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 229058 143

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JOHN F. DAVIS, CLERK

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PATRICK B. McGINNIS,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

REPLY BRIEF FOR THE PETITIONER PATRICK B. McGINNIS

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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I. CORRECTIONS OF FACTUAL STATEMENTS IN THE BRIEF FOR THE UNITED STATES OF AMERICA.

The petitioner feels that it is incumbent upon him to call to the Court's attention a number of factual statements in the Government's brief which are either misleading or incorrect. (Page references are to the Government's brief unless otherwise indicated.)

1. On page 4, commencing on the tenth line, the brief states that the "misapplication involved the sale by the B & M of 10 railroad cars to Mersey for the unreasonably low price of $250,000; . . . ." As for the statement that

the price was unreasonably low, we submit that the indictment contains no language which can fairly be interpreted as alleging that $250,000 was an unreasonably low price, or that McGinnis had any reason to suspect that the price was inadequate. The record contains no evidence that the price was unreasonably low (see Pet. No. 287, pp. 12a-13a).

The practice of substituting Mersey for International is followed three times in the same sentence. Although Mersey was a principal in International and acted as its agent, there is no reason for substituting Mersey's name for that of the corporate defendant in this manner.

2. The same sentence, on page 4, speaks of "the payment by Mersey (sic) of $71,500 to McGinnis, Benson and Glacy." Insofar as this statement implies that McGinnis, Benson and Glacy received joint payment, it is misleading. In fact, the payments were made separately, as the Government impliedly admits at page 8 of its brief. We raise this point because the implication that the payment was received jointly would lend credence to the Government's theory of a concert of action.

3. In footnote 4, at the bottom of page 6, the Government sets forth the substance of the transcript of a telephone conversation between *Mersey* and *Bugbee,* in which *McGinnis* is quoted as having said to Mersey, "Why in the hell would Atkinson want to come to me, then, if you are handling it?" (Ex. 80, R. 825). The quotation marks in this passage are misleading, for it is not McGinnis who is being quoted, but rather *Mersey* allegedly telling Bugbee what McGinnis had allegedly said.

4. Near the bottom of page 7, the brief states that "McGinnis, upon seeing the revised memorandum, told the clerk that it was 'satisfactory' ". This statement, and the language preceding it, is misleading in that it implies that McGinnis knew that what he was seeing was a revision

of an earlier draft. In fact, there was no evidence that McGinnis had ever seen the original memorandum, or knew of its source or existence.

5. In footnote 5, on page 8, the Government states that in each of the other 28 proposed sales of B & M property, the agenda showed the name of the B & M staff sponsor. This statement is flatly contradicted by the evidence (Ex. 89, Scheds. A-1 through A-28). (See Pet. No. 287, pp. 15a-17a). The misstatement is prejudicial, since it implies that the proposal in question was significantly unusual, and thus, perhaps, that McGinnis would have noticed this and made an investigation unless he was a party to the alleged conspiracy.

6. In the last full paragraph on page 8, the Government states that McGinnis received $35,000 from International "during the four-month period (August 13-December 16) following the sale". In fact, McGinnis was paid on two dates, October 10 and December 3, 1958 (Ex. 3A, 3B, 3C; R. 766, 767, 768). The statement is prejudicial because it implies a series of regular payments made over an extended period immediately following the sale, thus tending to support an inference that the sale and the payments were related.

7. Commencing at line 5 on page 9, the brief states that McGinnis admitted that the alleged services for International would have involved a conflict of interest between himself and the B & M. In fact, the statement to which the Government refers concerns another *proposed* transaction, and not the services for International for which McGinnis contended he was paid the $35,000 (R. 401-404). This error is highly prejudicial, since it amounts to an admission that McGinnis participated in, and was paid for, a violation of the trust reposed in him as an officer of the B & M. Actually, the opposite was true, since Mc-

Ginnis did not participate in the second transaction primarily because it would involve a conflict of interest (R. 403).

8. In the next sentence on page 9, the brief states that the stubs for McGinnis' checks from International were marked "loans". No evidence was presented concerning the stubs for McGinnis' checks. However, the vouchers which were attached to the checks were introduced (Ex. A, B, and R; R. 909, 953). Two of these were marked "Executive Consultant Fee-MacArthur Matter" (R. 909). Only the third was marked "Loan" (R. 953). McGinnis testified that upon receipt of the third check he called the bookkeeping department at International to inform them of the error and requested them to "change it" (R. 387).

II. The Government Has Failed To Substantiate McGinnis' Participation In the Alleged Conspiracy.

On page 15, the Government summarizes the evidence which allegedly demonstrates the participation of each of the individual defendants in the conspiracy. Commencing on the tenth line from the bottom of the page is the only sentence which purports to describe McGinnis' actions in furtherance of the conspiracy: "McGinnis persuaded the directors to approve the sale on the basis of the misleading memorandum which had been changed to eliminate the disclosure that Benson and Glacy were the sponsors of the proposal."

There is no evidence that McGinnis "persuaded" the directors to approve the sale. In fact, there was undisputed testimony that there was no discussion of the sale at the directors' meeting (R. 323).

There is no evidence, direct or circumstantial, that McGinnis knew of the original memorandum, or that it had

been revised, or that the proposal had come from Benson and Glacy.

In short, this statement in the government's brief is wholly unwarranted, as is the conclusion which it allegedly supports.

Respectfully submitted,

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